Supreme Court, U.S.
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No. 94-

In The

Supreme Court of the United States

OCTOBER TERM, 1994

LANSING DAIRY, INC., *et al.*,

Petitioners,

v.

DAN GLICKMAN,
SECRETARY OF AGRICULTURE, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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April 21, 1995

QUESTIONS PRESENTED

1. Whether *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), requires judicial deference to an agency's reversal of its longstanding interpretation of a statute that it administers, where the agency has neither acknowledged that it changed its interpretation nor provided a reasoned explanation of the change.

2. Whether a court, in applying *Chevron*, is required to draw reasonable inferences from the statutory text to determine the intent of Congress.

PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT

The petitioners in this case are Lansing Dairy, Inc., Liberty Dairy Company, and Frigo Cheese Corporation. Petitioners were plaintiffs in the district court and appellants/cross-appellees in the court of appeals.

Farmers Union Milk Marketing Cooperative, Gerald Piche, Peter J. Kleiman, Edward O. Kleiman, Art J. Corey, Jr., Raymond J. Marsicek, Ralph Brock, Ed E. Hanchek, Robert S. Hanchek, Raymond S. Huber, Benjamin C. Huber, and George A. Huber were plaintiffs in the district court and appellants/cross-appellees in the court of appeals. The Manitowac Milk Producers Association intervened as a plaintiff in the district court and an appellant/cross-appellee in the court of appeals.

Mike Espy, Secretary of Agriculture (as successor to Edward R. Madigan), was a defendant in the district court and an appellee/cross-appellant in the court of appeals. Pursuant to Rule 35.3 of the Rules of this Court, Secretary of Agriculture Dan Glickman is automatically substituted as a respondent in this Court. The Producers Equalization Committee intervened as a defendant in the district court and an appellee/cross-appellant in the court of appeals.

Lansing Dairy, Inc., is a wholly-owned subsidiary of Melody Farms, Inc., which in turn is a wholly-owned subsidiary of Melody Foods, Inc. Effective April 1, 1995, the assets of Lansing Dairy have been transferred to Melody

Farms, Inc. Liberty Dairy is a wholly-owned subsidiary of Dean Foods Company. Frigo Cheese Corporation has been merged into Stella Foods, Inc., a wholly-owned subsidiary of Specialty Foods Corporation.

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LANSING DAIRY, INC., ET AL.,

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DAN GLICKMAN,
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Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-40a) is reported at 39 F.3d 1339. The opinion of the district court

(App., *infra*, 41a-60a) is unreported. The decision and order of the Judicial Officer (App., *infra*, 61a-207a) are reported at 50 Agric. Dec. 1453. The initial decision and order of the Administrative Law Judge (App., *infra*, 208a-265a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 31, 1994. A petition for rehearing was denied on January 23, 1995. App., *infra*, 266a-267a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Sections 608c(5) and 608c(18) of Title 7, United States Code, and 7 C.F.R. Part 1040 are reproduced, in relevant part, at App., *infra*, 268a-278a.

STATEMENT

1. The Secretary of Agriculture regulates the price of raw milk under authority delegated to him by the Agricultural Marketing Agreement Act of 1937 ("AMAA"), as amended, 7 U.S.C. §§ 601-626 (1988 & Supp. V 1993). See *Lehigh Valley Coop. Farmers, Inc.* v. *United States*, 370 U.S. 76, 78-81 (1962). Pursuant to the AMAA, the Secretary has issued a series of Milk Marketing Orders regulating milk prices in specified geographic areas. Federal Order 40, the order at issue in this case, applies to southern Michigan. See 7 C.F.R. § 1040.2 (1994).

The Secretary's Milk Marketing Orders establish minimum prices that regulated dairy processors (known as "handlers") must pay dairy farmers (known as "producers")

for raw milk.[1] Congress has provided that Milk Marketing Orders may contain certain specified terms and "no others." 7 U.S.C. § 608c(5). A Milk Marketing Order may include terms:

> [c]lassifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay . . .. Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers.

7 U.S.C. § 608c(5)(A). This case involves location adjustments, the third type of adjustment to handler and producer milk prices permitted by § 608c(5).[2] Location adjustments are intended to take account of the cost of

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[1] Handlers pasteurize, process, and package fluid milk and milk products.

[2] Section 608c(5)(B) contains producer milk price provisions that complement the handler provisions of § 608c(5)(A) by requiring "payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered; subject . . . only to adjustments for . . . (c) the location at which delivery of such milk is made." The final farm price of raw milk depends upon the aggregate of all producer and handler price adjustments. See 7 C.F.R. § 1040.61.

transporting milk from rural areas where large amounts of milk are produced to handlers located in or near urban areas where locally-produced milk is in short supply. See *Schepps Dairy, Inc.* v. *Bergland*, 628 F.2d 11, 15-16 (D.C. Cir. 1979).

In addition to specifying the terms that the Secretary may include in a Milk Marketing Order, Congress has specified certain economic factors that the Secretary must consider "prior to prescribing any term in any marketing agreement or order, or amendment thereto, relating to milk or its products, if such term is to fix minimum prices to be paid to producers or associations of producers, or prior to modifying the price fixed in any such term." 7 U.S.C. § 608c(18). In particular, Congress has directed the Secretary to consider "economic conditions which affect market supply and demand for milk and its products in the marketing area," with the ultimate objective of "assur[ing] a level of farm income" that is sufficient to attract an adequate supply of milk. 7 U.S.C. § 608c(18). The underlying statutory question in this case is whether the Secretary is required to consider these economic factors prior to approving or amending price adjustments authorized by § 608c(5).

2. a. In 1988, the Producers Equalization Committee ("PEC") proposed to amend Order 40 by reducing location adjustments for milk delivered within Michigan's Southern Peninsula and increasing location adjustments elsewhere. PEC's proposal "had the general effect of increasing the amount which producers received for producing milk throughout the Southern Michigan milk marketing area" (where most of PEC's members are located), while lowering milk prices received by producers located outside southern Michigan. App., *infra*, 9a. See *Farmers Union Milk Marketing Coop* v. *Yeutter*, 930 F.2d 466, 470 (6th Cir. 1991).

The Secretary conducted a formal rulemaking proceeding pursuant to 5 U.S.C. §§ 556 and 557, and issued a final decision adopting PEC's proposed amendments to Order 40. See 54 Fed. Reg. 26,768 (1989) (proposed rule); 54 Fed. Reg. 29,327 (1989) (final rule).[3] The Secretary relied on 7 U.S.C. § 608c(5) as the statutory basis for the amendments, and declined to consider the economic factors set out in § 608c(18). See 54 Fed. Reg. at 26,774-75; Pet. App 99a-100a. Indeed, the Secretary expressly found that the supply of milk was adequate to meet demand prior to the amendments. 54 Fed. Reg. at 26,778; Pet. App. 114a. The Secretary's decision did not acknowledge that it was departing from prior agency practice, under which milk price adjustments for location consistently were evaluated with reference to the supply and demand standards of § 608c(18).

b. Petitioners sought administrative review of the milk price amendments. The Administrative Law Judge ("ALJ") issued a decision holding that the Secretary's action was not in accordance with law. App., *infra*, 208a-265a. The ALJ concluded that the Secretary had departed from his prior policy of applying the economic factors of Section 608c(18) to proposed location adjustments. The ALJ noted that "[t]his change of policy was not explained, thereby snubbing [the] principle" that "to the extent that it is 'changing course, [it] must supply a reasoned analysis indicating that prior policies are being deliberately changed, not casually ignored.'" App., *infra*, 252a (quoting *AT&T* v. *FCC*, 836 F.2d 1386, 1392-93 (D.C. Cir. 1988)). The ALJ further concluded that the

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[3] The Secretary's rulemaking decision is reprinted in full in the Judicial Officer's opinion. See App., *infra*, 70a-126a.

amendments could not be justified under the § 608c(18) standards. App., *infra*, 252a-254a.[4]

c. The Judicial Officer reversed the ALJ's decision. App., *infra*, 61a-207a. The Judicial Officer, like the ALJ, recognized that policy reversals must be acknowledged and explained by the agency. App., *infra* 200a. But the Judicial Officer asserted that the Secretary had consistently adhered to the position that he need not consider the § 608c(18) factors prior to adopting or modifying location adjustments. App., *infra*, 185a-186a.[5]

3. The district court (W.D. Michigan, Gibson, J.) entered summary judgment for petitioners. App., *infra*, 41a-60a. Applying the two-step analysis of *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837 (1984), the court concluded that Congress unambiguously required the Secretary to consider the economic factors set out in § 608c(18) prior to adopting location adjustments. The court stated that, in determining whether the statute is ambiguous, it would "apply the traditional tools of statutory construction to determine the

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[4] The ALJ also held that the amendments were invalid because the revised location adjustments were not supported by reference to any "economic service of benefit" to the milk handlers whose prices were increased. App., *infra*, 257a-260a; see *Zuber* v. *Allen*, 396 U.S. 168, 184 (1969). In addition, the ALJ held that the amendments were based on impermissible "consideration of the use to which the milk of a particular producer or class of producers is put," contrary to 7 U.S.C. § 608c(5)(B)(ii). App., *infra*, 263a (quoting *Zuber* v. *Allen*, 402 F.2d 660, 683 (D.C. Cir. 1968), *aff'd*, 396 U.S. 168 (1969)).

[5] The Judicial Officer also rejected the ALJ's other grounds for invalidating the amendments. The Judicial Officer concluded that "location adjustments can be adopted for any of the broad objectives of the Act," and are not limited to compensating producers for providing an "economic service of benefit" to handlers. App., *infra*, 191a.

intent of Congress." App., *infra*, 49a (citing *NLRB* v. *United Food & Commercial Control Workers Union, Local 23*, 484 U.S. 112 (1987)). Invoking the maxim that "[a] statute should be viewed as a whole," App., *infra*, 53a (citing 2A Norman J. Singer, *Sutherland on Statutory Construction* § 46.05 (5th ed. 1992)), the court looked to the language of 7 U.S.C. §§ 602 and 608c(5)(A) to conclude that the term "minimum prices" in § 608c(18) "encompasses both the original uniform price and the adjusted price." App., *infra*, 54a. In addition, the court applied the maxim that a court should be guided by "the purpose of the statutory scheme" in interpreting statutory language. Pet App. 57a. The court concluded that the purpose of the Act is to "guide the Secretary in setting prices in order to avoid disorderly market conditions," and that it would be "illogical for Congress to carefully articulate all factors the Secretary must take into account when fixing class prices yet allow location adjustments, which ultimately affect the actual cost of milk, to be adjusted without any guidance whatsoever." App., *infra*, 57a-58a. The court observed that the Secretary's interpretation would permit him "to circumvent the specific Congressional delegation by conducting all market regulation through price adjustments." App., *infra*, 58a.

4. The court of appeals (Celebrezze, Martin, and Batchelder, JJ.) reversed. App., *infra*, 1a-40a. In applying the *Chevron* analysis, the court concluded that "[b]ecause we cannot find the plain language of the statute to be unambiguous, we must defer to the Secretary's interpretation, unless we find that this interpretation frustrates the policy that Congress sought to implement." App., *infra*, 23a (internal quotation omitted). The court found portions of the legislative history "troubling," but ultimately concluded that the legislative history is as "fraught with ambiguity" as the statutory text. App., *infra*, 27a.

The court of appeals rejected as "not credible" the Secretary's contention that he had not changed his interpretation of the statute. App., *infra*, 30a. The court concluded, however, that "the fact that the Secretary's interpretation may be different from that followed in the past is irrelevant so long as the current interpretation is reasonable and does not conflict with the unambiguously expressed intent of Congress." App., *infra*, 31a. Applying this rule, the court concluded that it was "bound by *Chevron*" to defer to the agency's new interpretation. App., *infra*, 32a.[6]

REASONS FOR GRANTING THE PETITION

This case presents important questions concerning the judicial deference due to an agency's interpretation of a statute under this Court's decision in *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837 (1984). The court of appeals' decision conflicts with decisions of other courts of appeals and this Court in two different respects. *First*, the court of appeals accorded *Chevron* deference to the Secretary's revised interpretation of the AMAA, even though the Secretary failed to explain — or even acknowledge — his departure from the agency's longstanding prior interpretation of that statute. The court of appeals' decision thus permits a federal agency to

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[6] The court of appeals also rejected additional arguments made by petitioners. App., *infra*, 32a-39a. In rejecting petitioners' argument that the location adjustments were not justified by an "economic service of benefit" to handlers, App., *infra*, 36a (quoting *Zuber* v. *Allen*, 396 U.S. at 183), the court held that "the Secretary's decision, while not necessarily conforming to the letter of this requirement, is sufficiently in compliance with its spirit not to require reversal." App., *infra*, 39a. The court stated that "the Secretary appears to have taken the position . . . that milk delivered to plants in the western and northern regions is now worth more than it was in 1977 because of increased consumption in those areas," and that this is sufficient to satisfy the requirement of an "economic service of benefit" to handlers. App., *infra*, 39a.

depart from its settled interpretation of statutory language without any explanation for doing so, so long as its new interpretation is one that otherwise qualifies for *Chevron* deference. *Second*, the court of appeals engaged in a superficial and perfunctory analysis of the statutory text, contrary to recent decisions of this Court that have determined congressional intent based on "reasonable inferences" from the language of the statute.

The underlying statutory issue in this case — whether the Secretary is required to base adjustments to minimum milk prices on consideration of the economic factors specified by Congress — is of considerable practical importance. Pursuant to the AMAA, the Secretary regulates the price of more than 100 billion pounds of raw milk each year, with an aggregate value of more than $13 billion.[7] The prices that handlers pay for milk, and the farm income that producers receive, are directly affected by price adjustments approved by the Secretary of Agriculture pursuant to § 608c(5). The court of appeals' decision leaves the Secretary with virtually unlimited discretion to set the prices that handlers actually pay for milk (and that producers actually receive) without regard to the economic factors specified by Congress in § 608c(18). The court of appeals' decision thus represents a major development in the federal government's regulation of milk prices, and a dramatic expansion of the Secretary's delegated authority under the AMAA.[8]

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[7] United States Department of Agriculture, Agricultural Marketing Service, Dairy Division, *Federal Milk Order Market Statistics, 1993 Annual Summary*, Tables 12, 17, 23 (AMS Stat. Bull. No. 886, Aug. 1994).

[8] The AMAA has been before this Court in prior cases. See, *e.g.*, *Block* v. *Community Nutrition Institute*, 467 U.S. 340 (1984); *Zuber* v. *Allen*, 396 U.S. 168 (1969); *Lehigh Valley Coop. Farmers, Inc.* v. *United*

1. The court of appeals and the district court, as well as the agency's own ALJ, all concluded that "the Secretary's prior interpretations of §§ 608c(5) and 608c(18) explicitly recognized the fact that the Secretary's ability to promulgate location adjustments was restricted by § 608c(18)." App., *infra*, 28a. The court of appeals rejected, as "not credible," the Secretary's contention that he had not departed from his prior interpretation of the AMAA. App., *infra*, 30a. The court of appeals nevertheless held that the agency's unacknowledged and unexplained change of position was simply "irrelevant" for purposes of the *Chevron* analysis, because it concluded that the agency's "current interpretation is reasonable and does not conflict with the unambiguously expressed intent of Congress." App., *infra*, 31a.

a. The court of appeals' decision conflicts with decisions of other courts of appeals holding that an agency's revised interpretation of a statute that it administers is not entitled to *Chevron* deference unless the agency supplies a reasoned analysis for its decision to adopt a new interpretation. In *Mobil Oil Corp.* v. *EPA*, 871 F.2d 149 (D.C. Cir. 1989), the agency changed its interpretation of the term "facility" in a provision of the Resource Recovery and Conservation Act, 42 U.S.C. § 6924(h)(4). The court of appeals deferred to the agency's new interpretation, but only because the agency had "acknowledged that change" and "cogently explained the reasons for it." *Id.* at 154. The court explained that "an agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored." *Id.* at 152 n.5

States, 370 U.S. 76 (1962); *Brannan* v. *Stark*, 342 U.S. 451 (1952); *Stark* v. *Wickard*, 321 U.S. 288 (1944); *United States* v. *Rock Royal Coop, Inc.*, 307 U.S. 533 (1939). The Court's decisions repeatedly have stressed the narrowness of the Secretary's authority under the AMAA. See *infra* note 14.

(quoting *Greater Boston Television* v. *FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971)). Other courts of appeals have reached the same conclusion. See, *e.g.*, *Sacred Heart Medical Center* v. *Sullivan*, 958 F.2d 537, 544 (3d Cir. 1992) ("agency must offer a 'reasoned justification' for the change in its interpretation of a statute"); *Mazza* v. *Secretary of Dep't of Health & Human Services*, 903 F.2d 953, 959 (3d Cir. 1990) (reversing denial of Social Security benefits because, *inter alia*, agency "has not offered a reasoned justification" for changing its interpretation); *Flagstaff Medical Ctr., Inc.* v. *Sullivan*, 962 F.2d 879, 886 (9th Cir. 1992) ("changes in agency interpretation must be supported by a 'reasoned analysis' over and above that required for an interpretation in the first instance"); *Seldovia Native Ass'n Inc.*, v. *Lujan*, 904 F.2d 1335, 1346 (9th Cir. 1990) (agency's revised interpretation not entitled to deference unless "'the agency acknowledges and explains the departure form its prior views'") (citation omitted); *Exxon Corp.* v. *Lujan*, 970 F.2d 757, 762 n.4 (10th Cir. 1992) (when an agency changes its interpretation of a statute, it "'is obligated to supply a reasoned analysis for the change'") (citation omitted). See also 1 Kenneth Culp Davis & Richard J. Pierce, Jr., *Administrative Law Treatise* § 3.5, at 122 (3d ed. 1994) (agency must explain the reasons for changing the meaning it attaches to ambiguous statutory language).[9]

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[9] In *De Osorio* v. *INS*, 10 F.3d 1034 (4th Cir. 1993), the court stated that, "[b]ecause we find the Board's interpretation reasonable and consistent with congressional intent, any inconsistency between this decision and previous Board decisions is immaterial." *Id.* at 1042. Although the court did not state that the agency was required to provide a reasoned analysis of its change in position, it noted that the agency's prior position did not actually conflict with the agency's current interpretation of the statute. *Id.*

The court of appeals' decision is also in tension with this Court's decision in *Rust* v. *Sullivan*, 500 U.S. 173 (1991). In *Rust*, the Court deferred to the agency's revised interpretation of Section 1008 of the Public Health Service Act, 42 U.S.C. § 300a-6. Although the Court in *Rust* did not expressly consider whether the "reasoned analysis" requirement applies when an agency claims *Chevron* deference for a revised interpretation of a statute, the Court pointedly noted that "the Secretary amply justified his change of interpretation with a 'reasoned analysis.'" *Id.* at 187 (quoting *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983)).[10]

b. The decisions requiring an agency to provide a "reasoned analysis" of a change from one statutory interpretation to another as a prerequisite for *Chevron* deference are correct. The "reasoned analysis" requirement applies when the agency exercises its discretion to make a change that affects policy. See *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 41-42 (agency must explain departure from prior course that presumably reflected agency view that it would best "carry out the policies committed to it by Congress"); *Greater Boston Television*, 444 F.2d at 852 (requirement applies when agency's "policies are in flux"). The requirement plainly should be held to apply in the *Chevron* setting, because the basis for according *Chevron* deference to

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[10] The court of appeals' sweeping conclusion that an agency's change of position is simply "irrelevant" for *Chevron* purposes so long as its new interpretation is reasonable also conflicts with numerous decisions of this Court which recognize that "the consistency of an agency's position is a factor in assessing the weight that position is due." *Good Samaritan Hosp.* v. *Shalala*, 113 S. Ct. 2151, 2161 (1993). See, *e.g.*, *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987); *Watt* v. *Alaska*, 451 U.S. 259, 273 (1981); *Morton* v. *Ruiz*, 415 U.S. 199, 237 (1974); *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944).

the agency is the recognition that the choice among reasonable statutory interpretations is "often more a question of policy than of law." *Pauly* v. *Bethenergy Mines, Inc.*, 501 U.S. 680, 696 (1991). See *Chevron*, 467 U.S. at 865 (agency, unlike a court, may draw on "views of wise policy to inform its judgments"). See also *Wagner Seed Co.* v. *Bush*, 946 F.2d 918, 923 (D.C. Cir. 1991) ("resolution of an ambiguity in a statute, if it has consequences, inevitably requires the agency to consider competing policy objectives; it is the reconciliation of such conflicts that is entitled to judicial deference under *Chevron*").

According deference to the unexplained changes in statutory interpretation creates a grave risk of deferring when there is no valid reason for doing so. When an agency acts without acknowledging that its conduct is based on a new interpretation of a statute, it is entirely possible that the agency decision maker in whom discretion is vested has not made a considered decision to interpret the statute in a new way. Such unacknowledged changes may represent no more than *ad hoc* (and often *post hoc*) rationalizations by the agency. In such cases, there has been no considered exercise of an agency's congressionally-delegated discretion, and thus no *policy* choice to which courts should defer under *Chevron*.[11]

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[11] When an agency has acted in a way that is difficult to reconcile with its prior actions, the agency's lawyers may advance a new statutory interpretation in an effort to justify the agency's action. But "[s]tatements of agency lawyers in briefs and oral arguments are particularly unreliable evidence for an agency's policy, given the powerful incentive for lawyers to take any position that is likely to further their clients' interests in a case and the uneven level of supervision of the work product of agency lawyers." 1 Kenneth C. Davis & Richard J. Pierce, Jr., *Administrative Law Treatise* § 3.5, at 120 (3d ed. 1994). These concerns are particularly applicable to this case. The agency's revised interpretation was announced

c. In this case, the Secretary failed even to acknowledge his departure from the agency's established interpretation of the AMAA, let alone to offer any reasoned explanation for the change. Indeed, when petitioners pointed out that the Secretary had departed from his longstanding interpretation of the AMAA, the Secretary denied having done so. Consequently, the Secretary cannot possibly have satisfied the "reasoned analysis" requirement of *Mobil Oil* and similar cases. There is no evidence whatever that the agency's new interpretation of the AMAA reflects a considered exercise of congressionally-delegated discretion. The court of appeals nevertheless accorded full *Chevron* deference to the new interpretation, dismissing the agency's unacknowledged and unexplained departure from its longstanding prior interpretation as "irrelevant." App., *infra*, 31a. Further review is warranted because this case would have been decided differently by the courts of appeals for the D.C., Third, Ninth, and Tenth Circuits.[12]

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more than 50 years after Congress enacted § 608c(18), and the ambiguity supporting the revision was first discovered by the agency in the course of litigation.

[12] Although not presented as a separate question for review by this Court, petitioners note that the court of appeals' effort to construct an "economic service" justification for the price increases (see *supra* note 6) violates the cardinal rule that an administrative order can be sustained only on "the grounds upon which the agency acted." *SEC* v. *Chenery Corp.*, 318 U.S. 80, 95 (1943). The Secretary plainly did not conclude that increased consumption of milk in certain areas was sufficient to satisfy the "economic service" requirement. Indeed, the court of appeals' exclusive reliance on a demand-side factor actually *conflicts* with the Secretary's approach to such issues, which requires a balancing of supply and demand factors. See 59 Fed. Reg. 42,422 (1994); 59 Fed. Reg. 61,070, 61,091-97 (1994). Because the court of appeals' "demand-side only" approach to "economic service" is contrary to § 608c(18), it is unnecessary to decide whether it is additionally flawed for failure to comport with *Chenery* or *Zuber* v. *Allen*.

2. a. In concluding that Congress did not resolve the underlying question in this case, the court of appeals engaged in a perfunctory and superficial analysis of the statutory text. In so doing, the court of appeals departed from recent decisions of this Court, which hold that if "the text *and reasonable inferences from it* give a clear answer against the Government," that "'is the end of the matter.'" *Brown* v. *Gardner*, 115 S. Ct. 552, 556 (1994) (quoting *Good Samaritan*, 113 S. Ct. at 2157)) (emphasis added).

The Court's unanimous decision in *Brown* drew several inferences from the text of a veterans' statute, 38 U.S.C. § 1151, to conclude that disabled veterans are not required to show that their disability resulted from negligent treatment by the government or an accident during treatment in order to receive certain benefits. Although the Court agreed with the government's contention that the statutory term "injury" can "carry a fault connotation," 115 S. Ct. at 555, it did not immediately conclude that the statute was ambiguous. Instead, the Court drew inferences based on the "presumption that a given term is used to mean the same thing throughout a statute," as well as the maxim *noscitur a sociis* ("a word is known by the company it keeps"), and concluded that "injury" cannot reasonably be interpreted to imply fault in the context of 38 U.S.C. § 1151. *Id.* (quotation omitted). The Court also rejected the government's alternative argument on the basis of the maxim that "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate

inclusion or exclusion." *Id.* at 556 (quoting *Russello* v. *United States*, 464 U.S. 16, 23 (1983)).[13]

In this case, the district court drew inferences from the statutory text to conclude that Congress has given "a clear answer against the Government." *Brown*, 115 S. Ct. at 556. As in *Brown*, the district court conceded that "[a]t first blush, it might seem that the phrase 'minimum price' as used in section 608c(18) is ambiguous." App., *infra*, 53a. But the court proceeded to "examin[e] the phrase in the context of the rest of the statute" and "apply[] traditional canons of statutory construction." *Id.* Based on this more searching analysis, the district court concluded that "the term is not ambiguous and that [petitioners'] definition should prevail." *Id.*. The district court relied on the canon of statutory construction that "[a] statute should be viewed as a whole." *Id.* (citing 2A *Sutherland on Statutory Construction* § 46.05). The district court looked to the language of §§ 608c(5)(A) and 608c(5)(B)(ii)(c) to conclude that "the term 'minimum price' encompasses both the original uniform price and the adjusted price." App., *infra*, 54a & n.7. The district court also relied on the language of § 602, a "very general provision" that "refers to the entire pricing scheme set up under the statute." App., *infra*, 55a. The district court then applied the maxim that a court should be guided by "the purpose of the statutory scheme" in interpreting statutory language. App., *infra*, 57a. The court concluded that the purpose of the Act is to "guide the Secretary in setting prices in order to avoid disorderly

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[13] *Brown* v. *Gardner*, decided six weeks after the court of appeals' decision in this case, is one of several recent decisions of this Court that have concluded, based on rigorous analysis of the statutory text and inferences drawn from it, that Congress has spoken to the particular question at issue. See, *e.g.*, *MCI Telecommunications Corp.* v. *AT&T*, 114 S. Ct. 2223 (1994); *City of Chicago* v. *Environmental Defense Fund*, 114 S. Ct. 1588 (1994).

market conditions," and that it would be "illogical for Congress to carefully articulate all factors the Secretary must take into account when fixing class prices yet allow location adjustments, which ultimately affect the actual cost of milk, to be adjusted without any guidance whatsoever." *Id.* at 57a-58a.

The court of appeals, unlike the district court, made no attempt to draw reasonable inferences from the statutory text, and did not even state whether it was prepared to do so. The court of appeals' textual analysis amounted to little more than a conclusory statement that "we cannot find the plain language of the statute to be unambiguous." App., *infra*, 23a. The court of appeals did not even discuss some of the inferences drawn by the district court, such as its inference based on § 602.[14] The court of appeals thus deferred to the Secretary's interpretation based on little more than its conclusion that, "at first blush," the phrase "minimum prices"

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[14] The court of appeals also failed to consider whether it was reasonable to infer that the terms "prices" and "farm income" in § 608c(18) refer to the prices actually paid for milk and the farm income actually received by farmers. Moreover, the court of appeals largely ignored the well-known history of the AMAA. The AMAA replaced the Agricultural Adjustment Act ("AAA"), 48 Stat. 31, which delegated to the Secretary of Agriculture broad authority to issue licenses to handle agricultural commodities and to eliminate unfair practices or charges. The constitutionality of the AAA was called into question by the Court's decision in *Schechter Poultry Corp.* v. *United States*, 295 U.S. 495 (1935), which "disapproved a similarly broad delegation of power under the National Industrial Recovery Act." *Zuber* v. *Allen*, 396 U.S. at 175. "With [*Schechter*] specifically in mind, Congress set forth with deliberate particularity and completeness the terms which the Secretary might include in marketing orders." *Brannan* v. *Stark*, 342 U.S. 451, 465 n.16 (1952). Congress's intent was "to confine the boundaries of the Secretary's delegated authority." *Zuber*, 396 U.S. at 183. See also *Lehigh Valley*, 370 U.S. at 91-92. The practical effect of the court of appeals' decision is to give the Secretary largely unguided discretion to set milk prices.

is ambiguous. In so doing, the court of appeals departed from this Court's practice in recent cases of drawing all reasonable inferences from the statutory text to discern the intent of Congress. Accordingly, it would be appropriate for the Court to grant the petition, vacate the decision of the court of appeals, and remand for further consideration in the light of *Brown* v. *Gardner*.[15]

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[15] The Court may also wish to consider holding the petition in this case pending its decision in *Babbitt* v. *Sweet Home Chapter of Communities for a Great Oregon*, No. 94-859 (argued April 17, 1995). The question presented in *Sweet Home Chapter* is whether *Chevron* deference is owed to the agency's definition of the term "harm" in the Endangered Species Act of 1973, 16 U.S.C. § 1538(a)(1). See Pet. in No. 94-859 at i. Because the court of appeals applied the maxim *noscitur a sociis* to conclude that the Secretary's construction of the statute was contrary to Congress's intent, see *Sweet Home Chapter* v. *Babbitt*, 17 F.3d 1463, 1465 (D.C. Cir. 1994), it is possible that the Court's decision in *Sweet Home Chapter* will shed additional light on the role of inferences from the statutory text at one or both stages of the *Chevron* analysis.

CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, the petition should be granted, the decision of the court of appeals vacated, and the case remanded for further consideration in the light of *Brown* v. *Gardner*, 115 S. Ct. 553, 556 (1994).

Respectfully submitted,

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April 21, 1995

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APPENDIX A

Nos. 92-2231/2232/2233/2448/2449

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

LANSING DAIRY, INC.; LIBERTY DAIRY COMPANY; FRIGO CHEESE CORPORATION (92-2231); FARMERS UNION MILK MARKETING COOPERATIVE; GERALD PICHE; PETER J. KLEIMAN; EDWARD O. KLEIMAN; ART J. CORY, JR.; RAYMOND J. MARSICEK; RALPH BROCK; ED E. HANCHEK; ROBERT S. HANCHEK; RAYMOND S. HUBER; BENJAMIN C. HUBER; GEORGE A. HUBER, on behalf of themselves and all members of Farmers Union Milk Marketing Cooperative pooled under Federal Order 40 (92-2232), *Plaintiffs-Appellants, Cross-Appellees,*	)	On Appeal from the United States District Court for the Western District of Michigan

MANITOWOC MILK PRODUCERS ASSOCIATION (92-2232),
Intervenor Plaintiff-Appellant, Cross-Appellee,

v.

MIKE ESPY, successor to Edward R. Madigan, Secretary of Agriculture (92-2448/2449),
Defendant-Appellee, Cross-Appellant,

PRODUCERS EQUALIZATION COMMITTEE (92-2233),
Intervenor Defendant-Appellee, Cross-Appellant.

Decided and Filed October 31, 1994

Before: CELEBREZZE, MARTIN, and BATCHELDER, Circuit Judges.

ALICE M. BATCHELDER, Circuit Judge. This case concerns a dispute between groups of milk handlers, milk producers, and the Secretary of Agriculture (the "Secretary") over how certain benefits of federal milk price regulations should be distributed. This is a consolidated appeal from a decision of the United States District Court for the Western District of Michigan arising under the Agricultural Marketing

Act of 1937, as amended 7 U.S.C. §§ 601-74 (AMAA or the "Act").

The AMAA authorizes the Secretary to issue, and to amend, marketing orders for a wide variety of agricultural products, including milk. Milk marketing orders set the minimum prices which those who process dairy products, designated as handlers (as defined in 7 C.F.R. § 1040.9 (1994)), must pay to dairy farmers, designated as producers (as defined in 7 C.F.R. § 1040.12 (1994)). Specifically at issue in this appeal are the 1989 amendments to 7 C.F.R. Part 1040 §§ 1040.01-.86 (1994) ("Order 40"). The contested amendments changed plant location adjustments, 7 C.F.R. § 1040.52(a)(1) (1994), and increased mileage rates, 7 C.F.R. § 1040.52(a)(2) (1994), in Order 40; the net effect of these changes was to decrease revenues for some producers and handlers outside of the Southern Michigan milk marketing area. Groups of producers and handlers, upon whom the 1989 amendments have a negative financial impact, challenged the validity of these amendments on a number of grounds.

The district court, on cross-motions for summary judgment in these consolidated actions, held that the location adjustments promulgated by the Secretary pursuant to 7 U.S.C. § 608c(5) were invalid for failure to consider the economic factors outlined in 7 U.S.C. § 608c(18). Therefore, the district court ordered the Secretary to promulgate new location adjustments, specifically considering the economic factors in 7 U.S.C. § 608c(18). The determinative issue before the court in this appeal is whether the Secretary's power to order location adjustments is founded solely on the grant of authority in 7 U.S.C. § 608c(5), as urged by the Secretary; or whether, as argued by the plaintiffs and held by the district court, this power is conditioned on consideration of the economic criteria found in 7 U.S.C. § 608c(18). Because we find that the language of the relevant statutory

provisions is ambiguous and that the Secretary's interpretation of those provisions is reasonable, we now reverse.

I.

In order to understand this case, it is necessary to examine the mechanism used for the establishment of milk prices. This Court has addressed the circumstances surrounding the enactment of the AMAA in two prior cases. *See Farmers Union Milk Mktg. Coop. v. Yeutter*, 930 F.2d 466 (6th Cir. 1991); *Defiance Milk Prods. Co. v. Lyng*, 857 F.2d 1065 (6th Cir. 1988). In *Defiance Milk Products*, this Court explained the underlying basis and structure of the price regulatory system set out in the AMAA:

> Two conditions peculiar to the milk industry led to the establishment of a federally regulated milk price structure. The first is that raw milk has essentially two end uses: as fluid milk and as an ingredient in manufactured dairy products such as butter or cheese. The second condition is seasonality. Dairy cows produce more milk in the spring "flush" season than they do during the fall and winter.
>
> The confluence of these two conditions created problems which Congress decided necessitated regulation. Raw milk to be used as fluid milk commands a higher price than milk to be used in manufactured products. Fluid milk is highly perishable, and if it cannot be marketed quickly it must be manufactured into other dairy products.

Defiance Milk Prods., 857 F.2d at 1066.

Absent regulation, dairy farmers would obviously prefer to sell milk exclusively for fluid use since it commands the highest price; however, the seasonal nature of the dairy

industry prevents this. A dairy herd sufficient to produce a supply of fluid milk adequate for consumer needs in the fall and winter will produce a glut in the spring. Before regulation, handlers would obtain bargains during glut periods engendering aggressive and arguably destructive competition among producers. To maintain income, producers would increase production even more. In the 1920's, equilibrium was restored to the market by the formation of producer "cooperatives" which pooled their milk supplies and refused to deal with handlers except on a collective basis. However, the drop in commodity prices during the Depression destroyed the market equilibrium attained during the 1920's era of relative stability.

In 1933, in an effort to restore order to the various agricultural markets and boost the purchasing power of farmers, Congress decided to take the matter out of the hands of the free market. To that end, Congress enacted the licensing provisions of the Agricultural Adjustment Act, which resulted in the adoption of "base-rating plans not unlike the private arrangements that obtained in the 1920's . . . ." *Zuber v. Allen*, 396 U.S. 168, 175 (1969). However, in response to judicial decisions disapproving congressional economic initiatives which enacted "broad delegation of power . . . . Congress moved swiftly to eliminate the defect of overbroad delegation and to shore up the void in the agricultural marketing provisions." *Id.* Accordingly, in 1935, Congress, by amendment to the Agricultural Adjustment Act, adopted the AMAA, which is essentially the current agricultural marketing agreement structure.

Under the AMAA, the Secretary is given the authority, and the responsibility, to formulate and administer federal milk marketing regulations in various regions throughout the United States. *See* 7 U.S.C. § 608c(5). Each of these regions is referred to as a "marketing area" and the regulations

concerning the marketing of milk in the area are commonly referred to as "orders." There are presently forty-four such milk marketing orders being administered by the Secretary throughout the United States. These are described at 7 C.F.R. Parts 1001-39 (1994), and these marketing areas encompass virtually all major metropolitan areas in the United States.

Although the system established by the AMAA to regulate the sale of milk is of labyrinthine complexity, the first step is relatively simple: Handlers purchase milk from producers. However, the means by which this transaction is handled are quite complex due to the unique market for milk products. Milk which is alike in all other respects varies in price according to the use to which the milk is put. *See* 7 C.F.R. § 1040.40 (1994). Some milk is distributed in fluid form. This milk, called Class I, commands the highest price. 7 C.F.R. § 1040.50(a) (1994). Class II milk is milk that is made into "soft products" such as yogurt and cottage cheese. It is priced lower than Class I milk. 7 C.F.R. 1040(50)(b) (1994). Other products with a longer shelf life (such as butter, cheese, and powdered milk) are considered to be Class III; the milk used to produce these products commands the lowest price. 7 C.F.R. § 1040.50(c) (1994). The Class I price only is further adjusted based on the location of the plant within the marketing area. *See* 7 C.F.R. § 1040.52(a) (1994).

Through a device known as the producer settlement fund, the current system ensures that while producers receive a uniform price, handlers pay different rates depending on the ultimate end to which the milk is put. Handlers pay (directly to the producers) a minimum price that is set by regulation and computed by a complex formula that is basically an "average" price for milk that is used for all three classes. 7 C.F.R. § 1040.61 (1994). Because the price is an average price, some handlers end up paying too much and some end up paying too little. The difference between what they have

paid and what the milk they have purchased is worth is made up through the producer settlement fund. 7 C.F.R. § 1040.70 (1994). Handlers who have bought milk to be used for Class I purposes (and who have thus paid too little) pay money in to the fund, 7 C.F.R. § 1040.71 (1994), while those who have bought milk for Class III purposes receive payments from the fund. 7 C.F.R. § 1040.72 (1994). Because all producers receive the same uniform blend price, competition among farmers to sell as much of their milk as possible for fluid use is eliminated. Therefore, the theory goes, the producer delivering primarily into the Class I plant will, over time, receive more money than he would have had he priced his milk in competition with milk otherwise going into the Class III plant. The Class I producer thus receives value from other producers' deliveries to the Class III plant and, in recognition of that under the Order, he pools his Class I receipts with those of Class II and Class III, and all producers receive the uniform blended price. 7 U.S.C. § 608c(5)(C); 7 C.F.R. § 1040.73 (1994).

The minimum blend price paid to the producers is uniform in the sense that it does not vary based on the use to which the milk is put, but there are other factors that affect the amount of money that handlers pay and producers receive for milk. At issue in this case are the changes to minimum price wrought by "location adjustments." Location adjustments are adjustments to the base minimum price of milk, which are used as economic incentives to encourage the movement of producer milk from rural production areas to plants in population centers, and to align prices among neighboring markets. *See Walmsley v. Block*, 719 F.2d 1414, 1418-19 (8th Cir. 1983). This encouragement in Order 40 is provided by a negative adjustment that "lowers" minimum prices for producer milk that is delivered to plants in rural locations, and a positive adjustment that "increases" minimum prices for milk that is delivered from rural production areas to

plants in urban areas.[1] Location adjustments honor the fact that a handler who receives milk near areas of high consumption has a more valuable commodity than a handler who receives milk in a rural area where it is produced cheaply, but who must undertake the burden of transporting the milk to consumer markets. *See Schepps Dairy, Inc. v. Bergland*, 628 F.2d 11, 15-16 (D.C. Cir. 1979). Although handlers pay adjustments only on Class I milk, the producers receive adjustments on all of their milk because producers cannot be paid based on their use of milk. *See* 7 C.F.R. § 1040.75 (1994).

The free market also affects prices to a small extent. Although the minimum price is set by regulation, there is no maximum price. In the winter, when milk is relatively scarce, handlers can negotiate premiums called "over-order" price for the sale of milk. Market forces can, therefore, raise the price of milk but cannot lower it. There are other factors which affect the ultimate milk prices, but they are not involved in this case.

II.

Before issuing, or amending, a milk marketing order, the Secretary must conduct a formal on-the-record rulemaking proceeding. The public must be notified of these proceedings and provided an opportunity for public hearing and comment.

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[1] For example, as explained *infra*, prior to the amendments to Order 40 at issue in this case, plaintiff Lansing Dairy was located in an area with a -5 cent location adjustment. As a result, Lansing Dairy paid five cents per hundredweight less than the minimum price to producers for the milk that it purchased. The amendments to Order 40 placed Lansing Dairy in a 0 cents adjustment zone; therefore, Lansing Dairy must now pay 5 cents more per hundred weight for its milk than it did prior to the amendments to Order 40.

7 U.S.C. § 608c(3). In addition, before a milk marketing order, or amendment, may become effective, it must be approved by the handlers of not less than 50% of the volume of milk covered by the proposed order or amendment and also must be approved by at least two-thirds of the affected dairy producers in the region. 7 U.S.C. § 608c(8).

A. *The Rulemaking Proceedings*

Prior to September 1989, the Order 40 location adjustments divided the Michigan lower peninsula into seven different zones with price adjustments calculated according to the distance of the zone from the major market (Detroit - Flint - Bay City). The price adjustments in these zones (calculated in cents per hundredweight) were 0 cents, -5 cents, -7 cents, -9 cents, -11 cents, -14 cents, and -17 cents. In 1988, intervenor defendant-appellee, Producers Equalization Committee (PEC), presented two proposals for amendments to Order 40 to the Secretary. *See* 53 Fed. Reg. 15,851 (1988).

The PEC proposed an amendment to the location adjustments that did away with the old zoning scheme and substituted three zones with adjustments of 0 cents, -5 cents, and -7 cents. *See* 7 C.F.R. § 1040.52(a)(1) (1994). The effect of this amendment was to increase the number of counties that were in the zone that had a 0 cent adjustment. In addition, by eliminating the zones with the greatest negative adjustments, the amendment had the general effect of increasing the amount which producers received for milk produced throughout the Southern Michigan milk marketing area, the area in which the member producers of the PEC are located.

Further, the PEC proposed changes to prices outside of the lower peninsula of Michigan. The mileage rate sets the

price adjustment for producers located outside of the Southern Michigan region. This adjustment is made by increasing the mileage rate, which has the concomitant effect of lowering the minimum price received by producers outside of the marketing area.[2] The regulation is based on the shortest highway distance between the plant located outside the region and a plant within the region determined by the Secretary. 7 C.F.R. § 1040.52(a)(2) (1944). The applicable adjustment rate is based on cents per hundredweight per ten miles. Under the old regulations, the fixed amount was 1 cent; under the PEC's proposed regulation, adopted by the Secretary, the fixed amount is 2.25 cents.

The rulemaking proceeded in an apparently normal fashion, and no challenge is made to the technical aspects of those proceedings. The final decision was issued in June 1989. *See* 54 Fed. Reg. 26,768 (1989). The net effect of the rulemaking proceeding was the almost *in toto* adoption of the PEC's proposed amendments to Order 40.

B. *The Handlers' Action*

On August 22, 1989, three of the handlers affected by the amendments to the location adjustments in Order 40 initiated an action in the United States District Court for the Western District of Michigan, invoking the jurisdiction of the district court pursuant to 7 U.S.C. § 608c(15)(B) and 28 U.S.C. § 1331, and seeking judicial review of the final decision of the Secretary of Agriculture rendered pursuant to 7 U.S.C. § 608c(15)(A). Thereafter, on September 15, 1989, a similar

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[2] For example, the producer plaintiffs in this action claim that the amendment to the mileage rate adjustment reduced the price paid to producers by an additional 13 to 23 cents per hundredweight.

action was initiated in the same court by a group of producers from the area affected by the amendments.

These actions were consolidated; however, the district court dismissed each action. The handlers' action was dismissed on the ground that, under *Block v. Community Nutrition Institute*, 467 U.S. 340 (1984), and *United States v. Ruzicka*, 319 U.S. 287 (1946), a handler must "exhaust his available administrative remedies before seeking judicial review of a marketing order." Dismissal of the handlers' action was not appealed; rather, the handlers initiated a proceeding for administrative review, pursuant to 7 U.S.C. § 608c(15(A). Thereafter, on July 12, 1990, an Administrative Law Judge (ALJ) issued an Initial Decision and Order declaring the Secretary's "action in amending 7 C.F.R. § 1040.52(a)(1) and (2) . . . was not in accordance with law."

Pursuant to 7 C.F.R. §§ 900.65-71 (1994), the Secretary appealed the adverse determination of the ALJ to the Judicial Officer. On December 12, 1991, the Judicial Officer issued his Decision and Order, reversing the ALJ's decision, and rejecting all challenges to the promulgation of the location adjustment amendments and mileage rate amendments. *See In re Lansing Dairy Inc.*, 50 Agric. Dec. 1453, 1991 WL 313838 (Dec. 12, 1991). The Judicial Officer held that the amendments had been properly promulgated by the Secretary in accordance with § 608c(5), that there was no need to consider § 608c(18) economic factors, and that the amendments were therefore valid.

On December 23, 1991, handlers initiated their part of the present action, pursuant to 7 U.S.C. § 608c(15)(B). Plaintiff handlers present action seeks judicial review of the Secretary's final administrative order, issued by the Judicial Officer, which upheld the challenged location adjustment amendments.

Handlers also challenge the underlying rulemaking held pursuant to 7 U.S.C. § 608c(3) and (4).

C. *The Producers' Action*

Plaintiffs below who are producers of milk invoked the jurisdiction of the district court pursuant to the Administrative Procedure Act, 5 U.S.C. §§ 701-06, and 28 U.S.C. §§ 1331 and 1337, seeking review of that section of the Secretary's order, *see* 54 Fed. Reg. 26,780 (1989), which amended certain sections of Order 40. The producers initiated their action on September 15, 1989, directly challenging the rulemaking proceeding which resulted in the location adjustment and mileage rate amendments to Order 40. On October 2, 1989, the district court dismissed the producers' action on the ground that the producers "lack standing to challenge the validity of Order 40." In *Farmers Union Milk Marketing Cooperative v. Yeutter*, 930 F.2d 466 (6th Cir. 1991), however, this Court reversed the district court's dismissal of the producers' action, and held that the district court had jurisdiction to hear the producers' direct challenge to the Secretary's promulgation of the location adjustment amendments. Accordingly, the producers' action was remanded to the district court, and, on January 29, 1992, the producers' and handlers' actions were consolidated by the district court.

D. *The District Court's Decision*

On March 30, 1992, the district court, in *Farmers Union Milk Marketing Cooperative v. Madigan*, Nos. 1:89-CV-281, 5:91-CV-104, 1992 WL 71372 (W.D. Mich. Mar. 30, 1992), issued an Opinion and Order granting the consolidated plaintiffs' motion for summary judgment, holding that the contested price amendments wee unlawful because the Secretary failed to consider statutorily mandated supply and

demand factors set forth in 7 U.S.C. § 608c(18). The district court declined to decide other claims of rule invalidity raised by plaintiffs; the district court deferred issues of damages and remedy pending additional briefing.

In the remedies phase of the proceeding, the PEC argued that if the 1989 price amendments were invalid for failure to apply § 608c(18) criteria, preexisting rates were equally invalid for the same reason. On August 25, 1992, the district court issued an Opinion and Order on the issue of remedies, holding that the preexisting location adjustments were equally invalid for failure to consider § 608c(18) criteria. For this reason, the district court denied plaintiffs' request for injunctive relief because such relief would result in "reinstatement of a prior invalid rule or would leave the market unregulated." *Lansing Dairy, Inc. v. Madigan*, No. 5:91-CV-104 (D. Mich. Aug. 25, 1992).

For predominately the same reason, the district court held that the plaintiffs' measure of damages is not the difference between 1989 rates and preexisting rates because such a measure would erroneously "presume that the old regulations were somehow more valid than the present regulations . . . ." *Id.* Accordingly, the district court: (1) allowed the invalidated 1989 rates to remain in effect pending expedited rulemaking to adopt lawful rates for the future; and, (2) remanded the issue of damages, for expedited adjudication by the Secretary, to be based on the difference between prices paid under the invalidated regulations and prices which would have been paid had proper regulations been issued in 1989.

III.

A.

This action comes before this Court on cross-motions for summary judgment. Summary judgment is appropriate where "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The fact that both parties have filed summary judgment motions does not alter the standard by which we review these motions. "Rather, the court must evaluate each party's motion on its own merits, taking care in each instance to draw all reasonable inferences against the party whose motion is under consideration." *Taft Broadcasting Co. v. United States*, 929 F.2d 240, 248 (6th Cir. 1991) (quoting *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1391 (Fed. Cir. 1987)).

The moving party has the burden of conclusively showing that no genuine issue of material fact exists. *Id.* at 247. Nevertheless, in the face of a summary judgment motion, the nonmoving party cannot rest on its pleadings but must come forward with some probative evidence to support its claim. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986); *60 Ivy St. Corp. v. Alexander*, 822 F.2d 1432, 1435 (6th Cir. 1987).

"By its very terms, this standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). The dispute must be genuine and the facts must be such that if they were proven at trial, a reasonable jury could return a verdict for the nonmoving party. *60 Ivy St. Corp.*, 822 F.2d at 1435. If the disputed evidence "is merely colorable, or is not significantly

probative, summary judgment may be granted." *Anderson*, 477 U.S. at 249-50 (citations omitted).

B.

The key issue dividing the plaintiffs and the defendants is the interpretation and interplay of two provisions of the AMAA: § 608c(5) and § 608c(18). This is apparently the first time this precise issue has come before any federal court.

7 U.S.C. § 608c(5)(A) provides that milk orders shall contain one or more of the following terms and conditions:

> (A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers. Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers.

7 U.S.C. § 608c(18) states:

> The Secretary of Agriculture, prior to prescribing any term in any marketing agreement or order, or amendment thereto, relating to milk or its products, if such term is to fix minimum prices to be paid to producers or associations of producers, or prior to modifying the price fixed in any such term, shall ascertain the parity prices of such commodities. The prices which it is declared to be

the policy of Congress to establish in section 602 of this title shall, for the purposes of such agreement, order, or amendment, be adjusted to reflect the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk or its products in the marketing area to which the contemplated marketing agreement, order, or amendment relates. Whenever the Secretary finds, upon the basis of the evidence adduced at the hearing required by section 608b of this title or this section, as the case may be, that the parity prices of such commodities are not reasonable in view of the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk and its products in the marketing area to which the contemplated agreement, order, or amendment relates, he shall fix such prices as he finds will reflect such factors, insure a sufficient quantity of pure and wholesome milk to meet current needs and further to assure a level of farm income adequate to maintain productive capacity sufficient to meet anticipated future needs, and be in the public interest. Thereafter, as the Secretary finds necessary on account of changed circumstances, he shall, after due notice and opportunity for hearing, make adjustments in such prices.

The plaintiff handlers and producers assert that any adjustment made to price via a § 608c(5) location adjustment is an adjustment to the § 608c(18) minimum price and must therefore take into account the economic factors found in § 608c(18). The Secretary, however, while agreeing that his authority to *set* minimum prices is circumscribed by § 608c(18), argues that he is not similarly restrained when making *adjustments* to minimum price pursuant to § *608c(5)*.

Plaintiffs argue that the plain meaning of § 608c(18) requires that, before the Secretary makes or amends rules affecting price, he must first undertake an analysis of market supply and demand. Plaintiffs contend that the Secretary should not promulgate rules or amendments affecting location adjustments unless he first finds that supply is inadequate to meet demand or that some disorderly market condition has resulted. The Secretary's final rulemaking specifically states that supply was *adequate* to meet demand prior to the rulemaking. 54 Fed. Reg. 26,778 (1989). Therefore, plaintiffs maintain that the prerequisites of § 608c(18) have not been met and that it was impermissible for the Secretary to amend Order 40.

The Secretary and the PEC assert that the 1989 amendments were promulgated pursuant to § 608c(5) which, they claim, gives the Secretary authority to make location adjustments but does not require the Secretary to undertake the economic analysis found in § 608c(18). The crux of the disagreement between the parties centers on the interpretation of the term "minimum prices." Section 608c(18) clearly requires that the Secretary take into account the economic factors described in that section before undertaking a rulemaking which fixes minimum prices. 7 U.S.C. § 608c(18). Defendants argue that minimum prices are the unadjusted Class I, Class II, Class III, and blend prices set for the region. While defendants acknowledge that the Secretary must consider § 608c(18) criteria when setting or modifying these class or blend prices, they argue that the regulation at issue did not change these prices but, instead, merely altered the adjustments that were made to the minimum price. Thus, the defendants claim that the Secretary did not need to consider the requirements of § 608c(18).

Plaintiffs, on the other hand, claim that the term "minimum prices" encompasses the adjusted prices in effect

in each zone. According to plaintiffs, any change in the location adjustment changes the minimum price. Therefore, plaintiffs contend that the Secretary must consider § 608c(18) factors before making location adjustments. Plaintiffs acknowledge that § 608c(5) gives the Secretary the authority to make location adjustments, but insist that § 608c(5) was meant to work in association with § 608c(18). Essentially, plaintiffs argue that § 608c(5) lists the types of rules that the Secretary has the authority to promulgate, but that § 608c(18) tells the Secretary when he can promulgate those rules.

Finally, the Secretary argues that it is plain from the language of § 608c(5)(A) that the location adjustment authority is not related to the setting of minimum price. Rather, it is related to the requirements that "[s]uch prices shall be uniform as to all handlers," expressly subjecting the "uniformity" requirement to the authority of the Secretary to "adjust" the price for the location at which milk is delivered. The Secretary also points out that § 608c(5) was originally enacted in 1935 and that § 608c(18) was not enacted until 1937. As a result, the Secretary asserts, the enactment of § 608c(18) was intended only to affect the Secretary's ability to set minimum prices, and not to affect the authority of the Secretary either to classify or to vary the uniformity of the prices and payments.

The district court rejected the Secretary's construction of the AMAA, holding that,

> [t]he term minimum price as used in section § 608c(18) is nowhere explicitly defined in the statute nor is it defined by the Secretary in the regulations. Neither party could point the Court to any cases defining the phrase or specifically discussing its meaning in section § 608c(18). At first blush, it might seem that the phrase "minimum price" as used in section § 608c(18) is

ambiguous and capable of two interpretations. Were the Court to find that such was the case, it would be required by the *Chevron* doctrine to defer to agency interpretation. After examining the phrase in the context of the rest of the statute, applying traditional canons of statutory interpretation, and viewing the legislative history and the Secretary's own use of the phrase, however, the Court concludes that the term is not ambiguous and that the plaintiffs' definition should prevail.

A statute should be viewed as a whole; therefore, this Court need not confine its interpretation to the one section it is now attempting to construe. *See* 2A *Sutherland Statutory Construction* § 46.05 (1992). It is thus appropriate for the Court to look at section § 608c(5) when interpreting the phrase "minimum price." Section § 608c(5)(A) states that the Secretary may fix a minimum price "for each such use classification which all handlers shall pay . . . ." 7 U.S.C. § 608c(5)(A). The statute goes on to state that:

> Such prices shall be *uniform* as to all handlers, *subject only to adjustments* for (1) volume, market, and production differential customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which such milk, or any such use classification thereof, is made to such handlers.

7 U.S.C. § 608c(5)(A) [emphasis added].

These passages indicate that the uniformity of minimum price, not the minimum price itself, is subject to the location adjustments. Congress could have stated that minimum prices were subject to adjustments, implying that the minimum price was a base figure which, when altered by adjustments, became something other than a minimum price. Instead, the statute

defines minimum price as a price which is initially uniform. The statute then allows departure from the *uniform* price in order to account for factors such as differences in location. Such a reading indicates that the term minimum price encompasses both the original uniform price and the adjusted price. Since the term minimum price includes adjusted prices, any regulation changing the adjustments in price mush necessarily affect the minimum price.

Farmers Union, 1992 WL 71372, at *6 (footnote omitted).

IV.

When a court reviews an agency's construction of a statute it is confronted with two questions. First and foremost is the question whether Congress has directly spoken to the matter at hand. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984). "If the intent of Congress is clear, that is the end of the matter; for the court as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. If, however, the court decides that Congress has not directly addressed the precise question at issue, the court may not simply impose its own construction of the statute. *Id.* at 843. "Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.*

Moreover, if a court finds the language of §§ 608c(5) and 608c(18) to be ambiguous, the Secretary's construction may not be disturbed if it reflects a reasonable construction of the statute and does not otherwise conflict with Congress' expressed intent. *Rust v. Sullivan*, 500 U.S. 173, 184 (1991). More importantly, in determining whether the Secretary's construction is permissible, this Court "need not conclude that

the agency construction was the only one it permissibly could have adopted . . . or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." *Chevron*, 467 U.S. at 843, n.11. "Rather, substantial deference is accorded to the interpretation of the authorizing statute by the agency authorized with administering it." *Rust*, 500 U.S. at 184.

However, this deference does have its limits. Courts may invalidate agency adjudication or rulemaking which is "inconsistent with the statutory mandate or that frustrate[s] the policy that Congress sought to implement." *Federal Election Comm'n v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 32 (1981). Similarly, where the court determines that, given the intention of Congress to achieve some goal, "'there are compelling reasons that [the agency interpretation] is wrong,'" the court may invalidate the agency's action. *Boettger v. Bowen*, 923 F.2d 1183, 1186 (6th Cir. 1991) (quoting *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381 (1969)). "[A] reviewing court should not defer to an agency position which is contrary to an intent of Congress expressed in unambiguous terms." *Estate of Cowart v. Nicklos Drilling Co.*, 112 S. Ct. 2589, 2594 (1992); *accord Chemical Mfrs. Ass'n v. Natural Resources Defense Council, Inc.*, 470 U.S. 116 (1985).

The Court's first task is to determine whether the text of the AMAA addresses the precise issue at hand here — whether the Secretary is required to undertake a § 608c(18) economic analysis when exercising his § 608c(95) authority to make location adjustments to the minimum price of milk. The district court held that it does. Stating that it had utilized "traditional canons of statutory interpretation . . . the legislative history and the Secretary's own use of the phrase [minimum price] . . . " to determine that "the term is not ambiguous and that the plaintiffs' definition should prevail,"

Farmers Union, 1992 WL 71372, at *6, the district court rejected the Secretary's assertions that the plain language of § 608c(18) did not affect the Secretary's power to promulgate location adjustments pursuant to § 608c(5); that the language of § 608c(5) is not ambiguous; and that the plain language of §§ 608c(5) and 608c(18), read together, requires the Secretary to undertake the § 608c(18) analysis before making adjustments pursuant to § 608c(5).

Reading §§ 608c(5) and 608c(18) *in pari materia*, the district court concluded that the language of § 608c(5) permits the Secretary to make adjustments to the uniformity of the minimum price, but not to the minimum price itself. This distinction, the district court held, dictated the further conclusion that the term "minimum price" encompassed both the original uniform price and any adjustments to that uniform price.

The Secretary, on the other hand, believes that the term "minimum price" means only the original price which he must fix for the classification of milk. The Secretary contends that the adjustments which he is authorized to make pursuant to § 608c(5), such as the location adjustments, are adjustments to uniformity, and that nothing in § 608c(18) requires that "minimum price" be read to include the original price as adjusted. In other words, the Secretary reasons that the "minimum price" is the original price that is the baseline from which he must calculate every adjustment which he is authorized by § 608c(5) to make.

The AMAA, and §§ 608c(5) and 608c(18) in particular, like much federal legislation, is not a model of clarity or succinctness. The interpretations of both the district court and the Secretary are reasonable and arguably can be supported by the language of the Act. However, we find that neither construction supports a finding that Congress has directly

spoken on the "precise question at issue;" therefore, neither the plaintiffs' nor the Secretary's interpretation "give[s] effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43. The "[s]uch prices shall be uniform," language of § 608c(5) and the "prior to modifying the price fixed in any such term," language of § 608c(18), relied upon the district court in its decision, are certainly susceptible to at least two different interpretations.

It is not our task to rewrite the language of the statute, nor to lecture Congress in how to write a statute which we could confidently declare is not ambiguous. It is, however, the duty of this Court faithfully to give effect to the unambiguously expressed intent of Congress; and, where there is no such unambiguously expressed intent, to determine if the agency whose duty it is to administer the statute has interpreted it in a reasonable and rational fashion. While we will not dwell on whether in recent years "unambiguously expressed intent of Congress" has become an oxymoron, we must declare that here we fail to see how the "plain language" of the contested provisions exclusively or even lopsidedly supports either the plaintiffs' or defendants' construction of the Act. If anything about this statute is plain, it is that if Congress had intentions with respect to the issue before us now, they certainly failed to make these intentions explicit in the text of the Act.

Because we cannot find the plain language of the statute to be unambiguous, we must defer to the Secretary's interpretation, unless we find that this interpretation "frustrate[s] the policy that Congress sought to implement." *Federal Election Comm.*, 454 U.S. at 32. In order to determine what policy Congress sought to implement, we must resort to the Act's legislative history. First, we note that the district court relied on the Act's legislative history to the extent that it found:

> The legislative history of section § 608c(18) indicates that it was enacted for "the guidance of the Secretary in fixing milk prices." S. Rep. No. 565, 75th Cong., 1st Sess. 3 (1937). It would be illogical for congress to carefully articulate all factors the Secretary must take into account when fixing class prices yet allow location adjustments, which ultimately affect the actual cost of milk, to be adjusted without any guidance whatsoever.

Farmers Union, 1992 WL 71372, at *8.

We find, however, that this reading of the legislative history is too broad, and is improperly based on the district court's own interpretation of what the district court found it was "logical" for Congress to have intended. Section § 608c(5) of the Act was added to the Agricultural Adjustment Act in 1935. Act of Aug. 24, 1925, Pub. L. No. 320 § 5, 49 Stat. 750, 754-57. Section 608c(18) was added two years later, when certain provisions of the Agricultural Adjustment Act were reenacted. Act of June 3, 1937, Pub. L. No. 137, § 2(f), 50 Stat. 246, 247. The House Report to § 608c(18), in relevant part, provides:

> Section 2 (f) of the bill adds to section 8 (c) of the Agricultural Adjustment Act two new subsections. The first deals with milk prices. Milk is the only commodity for which producer prices for interstate milk may be fixed by the Secretary of Agriculture through orders under the Agricultural Adjustment Act. The necessity for price regulation in the case of milk has also been recognized by many States which have established milk boards to fix producer prices for intrastate milk, and the validity of such State regulation has been upheld by the Supreme Court (*Nebbia v. New York* (1934), 291 U.S. 502). Marketing agreements and orders for milk ordinarily involve pooling and price plans which, to be effective,

must continue with the up and down swings of economic factors which relate to price. The proposed amendment recognizes this, and provides that if the Secretary finds that the national parity price for milk does not adequately reflect the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk in the marketing area to which the marketing agreement or order relates, he shall fix such prices as will reflect such factors, insure a sufficient quantity of pure wholesome milk, and be in the public interest. *The proposed amendment further provides that as the Secretary finds necessary on account of changed circumstances, he shall make adjustments in such prices. Such adjustments are to made in accordance with the same standards as are provided for the initial fixing of prices under this subsection.*

H.R. Rep. No. 468, 75th Cong., 1st Sess. (1937) (emphasis added).

Similarly, the Senate Report to § 608c(18) states, in relevant part:

Subsection (18) added to section 8 (c) of the Agricultural Adjustment Act by section 2 (f) of the bill provides a more workable standard for the guidance of the Secretary in fixing milk prices in an order issued for a particular marketing area. Milk is the only agricultural commodity for which prices are permitted to be fixed in orders issued under the Agricultural Adjustment Act and the Secretary is required to use the purchasing power of milk as his guide in the issuance of orders. This provision of the bill requires the Secretary, if an order or marketing agreement is to include fixed prices, to ascertain the prices which will be equivalent in purchasing power to prices of milk in the base period according to

> sections 2 and 8e of the Agriculture Adjustment Act. In addition, if he finds these ascertained prices are not reasonable in view of local price of feeds, the available supply of feeds and other economic conditions which affect the supply of and demand for milk in a particular marketing area, the Secretary shall fix such prices as will reflect these conditions, insure a sufficient quantity of pure and wholesome milk, and be in the public interest. The peculiar nature of milk as a commodity and the power of requesting prices of this commodity have been set forth by the Supreme Court in its decision in the case of *Nebbia v. New York (1934)*, 291 U.S. 502.
>
> The reasoning there set forth can be applied with equal force to the regulation of interstate commerce in milk. The intricate problems of the milk industry as described in the above cited opinion, explain the use of the several pooling and price plans authorized for inclusion in milk orders. Their effectiveness depends upon their adaptability to conditions affecting each marketing area and upon their adjustment from time to time to meet changing conditions. *The Secretary is to use the same standard in adjusting prices as is to be used in the fixing of prices initially in the regulation of any marketing area.*

S. Rep. No. 565, 75th Cong., 1st Sess. (1937) (emphasis added).

While the legislative history does explicitly state that it is Congress' policy to provide "guidance [to] the Secretary in fixing milk prices," there is nothing in either report which expresses the unambiguous intent on the part of Congress for a construction of the Act other than that given it by the Secretary. Despite the district court's concerns that the Secretary can utilize his location adjustment authority to circumvent the economic factors of § 608c(18), there is

nothing in the legislative history of the Act which indicates Congress was concerned about this possibility.

Having said this, we note that the last two sentences of both reports are troubling. One fair reading of that language supports the plaintiffs' contentions that when "adjusting prices" the Secretary is to use the "same standard" as that used in the fixing of prices initially; that is, the economic criteria of § 608c(18). However, this language is as fraught with ambiguity as the text of the Act itself. Nowhere in the legislative history is it specified whether "adjusting prices" refers to an adjustment to the minimum price pursuant to § 608c(5) or, whether this language refers to the Secretary's authority in § 608c(18) to adjust or modify the minimum price which he initially fixed. Neither is it clear to what "price" the House and Senate Reports are referring. Is this the "uniform" price, the "minimum" price, or the "adjusted" price? All of these concerns serve to delineate the fact that the legislative history of the AMAA does not make Congress' intent with respect to the issue before us any clearer.

Finally, the district court found, and the plaintiffs urge, that the Secretary's "new" interpretation of the AMAA is entitled to little or no deference because it reverses a longstanding agency policy that any location adjustment made under the authority of § 608c(5) must comport with the economic criteria of § 608c(18). The Secretary, on the other hand, contends that the interpretation argued in this Court has for over fifty years been the "contemporaneous and settled construction of the Act." The Supreme Court has long held that "[a]n agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987) (quoting *Watt v. Alaska*, 451 U.S. 259, 273 (1981); *see*

also Batanic v. INS, 12 F.3d 662, 666 (7th Cir. 1993); *Exxon Corp. v. Lujan*, 970 F.2d 757, 762 (10th Cir. 1992).

The district court, when faced with these arguments, concluded that the Secretary was not entitled to deference because he had not acted consistently. The district court determined that the Secretary's prior interpretations of §§ 608c(5) and 608c(18) explicitly recognized the fact that the Secretary's ability to promulgate location adjustments was restricted by § 608c(18). The district court found support for its holding in several different sources. In a publication put out by the United States Department of Agriculture (USDA) entitled *Questions and Answers on Federal Milk Marketing Orders*, (AMS-559) (USDA pamphlet), the term "minimum price" was defined as "the least amount that proprietary handlers can pay producers for milk." This definition necessarily assumes that location adjustments are part of the minimum price as it would violate the marketing scheme for handlers in outlying zones to pay less than the adjusted price.

The district court next pointed out that the Secretary, through his Judicial Officer, has appeared to acknowledge overtly that he has a duty to comply with § 608c(18) when promulgating location adjustments. In the case *In re Borden*, 46 Agric. Dec. 1315, 1987 WL 119801 (Sept. 30, 1987), the Judicial Officer wrote that "§ 8c(18) of the Act (7 U.S.C. § 608c(18)) requires the Secretary to set milk prices, including location adjustments, at a level that will, by themselves, 'insure' a sufficient quantity of milk, now and in the future." *Id.* at 1459-60. A few pages later, the Judicial Officer continued, "the Secretary is required by § 8c(18) of the Act to make certain that the Class prices and location adjustments in every milk order are high enough to attract milk to every part of a marketing area." *Id.* at 1461. Thus, in the only authority directly on point, the Secretary's own Judicial

Officer concluded that the Secretary's duties in setting location adjustments were governed by § 608c(18).

The Judicial Officer now disclaims any intent on his part to imply that the Secretary's ability to make location adjustments is restricted by § 608c(18). In his decision in the matter now before us, he held: "The entire [*Borden*] decision should be read for a full understanding of location adjustments. . . . I did not hold in *Borden* that location adjustments must be justified by a § 8c(18) analysis. I expressly held that the Secretary's location adjustment authority is under § 8c(5)." *In re Lansing Dairy*, 1991 WL 313838, at *60. Despite the Judicial Officer's avowals to the contrary, we believe that his opinion in *Borden* implies that the Secretary's location adjustments must comply with the requirements of § 608c(18).

In the Secretary's Proposed Rules, 54 Fed. Reg. 26,768 (1989), he gives further evidence that § 608c(18) has been relied upon in the past to justify location adjustment amendments. The Secretary cites to three letters sent to handlers denying their requests for location adjustments. In each of the three letters the stated reason for denying the amendment was "supply demand pricing standards contained in section 8c(18) of the Act." *Id.*

While no federal court has explicitly dealt with the issue of whether location adjustments must be promulgated pursuant to § 608c(18), at least one court has implicitly found that location adjustments are part of minimum prices and, as such, are governed by § 608c(18). In *Jones v. Bergland*, 456 F. Supp. 635 (E.D. Pa. 1978), the Secretary issued a notice containing proposals for altering location adjustment differentials. The final order that was adopted, instead of merely making location adjustments, also changed the Class I price in the region. Plaintiffs in the case claimed that the

order should not go into effect because the original notice was insufficient to make the Class I change because it "included a variety of proposals which effectively would have altered the *minimum price* of milk to . . . producers." *Id.* at 643 (emphasis added). As the district court in the matter before us noted: "In making this determination, the *Jones* court found that, at least for the purpose of notice, changes in location adjustments were one of several types of changes in minimum price that the Secretary might make." *Farmers Union*, 1992 WL 71372, at *8.

The plaintiffs in this appeal also direct our attention to *Schepps Dairy, Inc. v. Bergland*, 628 F.2d 11 (D.C. Cir. 1979), which they assert buttresses their argument that the Secretary's position in this case is a sharp break with past practice. While we do not think that the *Schepps* case itself is particularly helpful to the plaintiffs' cause, the Secretary's brief from that case is interesting. In that brief, arguing against having to make a location adjustment in Houston, the Secretary states "[t]he use of location differentials under Section 8c(5)(A) is permissive and *is governed* by the provisions in the Act which require that the Secretary set prices that insure an adequate supply of milk to the market and protect the public interest. 7 U.S.C. §§ 608c(4) and 608c(18) . . . ." (emphasis added). In light of this evidence, indicating that the Secretary has given at least lip service to § 608c(18) when making § 608c(5) location adjustments in the past, we find not credible the Secretary's assertions that the interpretation of the Act he advances in this litigation is the same that he has adhered to for the last fifty years.

However, the fact that the Secretary is now advocating a position that is inconsistent with his past interpretation does not allow this Court simply to discount his current position. Quite the contrary, in *Rust v. Sullivan*, 500 U.S. 173, 186-87 (1991), the Supreme Court held that an agency may change its

interpretation of a statute so long as its position is reasonable and does not conflict with congressional intent. Specifically, the Court rejected the argument that "an agency's interpretation 'is not entitled to deference because it represents a sharp break with prior interpretations' of the statute in question." *Id.* at 186 (quoting *Chevron*, 467 U.S. at 862). The Court went on to hold "that a revised interpretation deserves deference because '[a]n initial agency interpretation is not instantly carved in stone' and 'the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis.'" *Id.* (quoting *Chevron*, 467 U.S. at 863-64); *see also Garrett v. Lyng*, 877 F.2d 472, 476 (6th Cir. 1989) (so long as agency remains within the bounds established by Congress, it may reformulate its interpretations in light of political philosophy of the current administration). Therefore, the fact that the Secretary's interpretation may be different from that followed in the past is irrelevant so long as the current interpretation is reasonable and does not conflict with the unambiguously expressed intent of Congress.[3]

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[3] Justice Scalia aptly summed up this principle in a lecture he gave at the Duke University School of Law.

> The theory that judicial acquiescence in reasonable agency determinations of law rests upon real or presumed legislative intent to confer discretion has certain consequences which the courts do not yet seem to have grasped. For one thing, there is no longer any justification for giving "special" deference to "long-standing and consistent" agency interpretations of law. That venerable principle made a lot of sense when we assumed that both court and agency were searching for the one permanent, "correct" meaning of the statute; it makes no sense when we acknowledge that the agency is free to give the statute whichever of several possible meanings it thinks most conducive to accomplishment of the statutory purpose." Under the latter regime, there is no apparent justification for holding the agency to its first answer, or penalizing it for a change of mind.

Because, as discussed above, the language of the Act and the legislative history are not unambiguous and the Secretary's interpretation is neither unreasonable nor in conflict with Congress' intent, we are bound by *Chevron* to uphold the Secretary's interpretation.

V.

The district court, having reached the conclusion that the contested amendments to Order 40 were unlawful for failure to address § 608c(18) economic factors, declined to address several other alleged defects in the rulemaking raised by the plaintiffs. Nonetheless, this Court may affirm the district court's judgment on any additional or alternative grounds for affirmance asserted by the party that prevailed in the district court. *See Dandridge v. Williams*, 397 U.S. 471, 475 n.6 (1970); *Katt v. Dykhouse*, 983 F.2d 690, 695 n.3 (6th Cir. 1992). Plaintiffs argue that even if a § 608c(18) analysis is not required when making location adjustments, the 1989 amendments are nonetheless invalid for a number of reasons. The plaintiffs argue first that the amendments are invalid because they are not supported by substantial record evidence; next, that the amendments are not based on an "economic service of benefit" to the handlers; third, that the amendments are invalid because the Secretary relied on the "prohibited

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> Indeed, it seems to me that such an approach would deprive *Chevron* of one of its major advantages from the standpoint of governmental theory, which is to permit needed flexibility, and appropriate political participation, in the administrative process. One of the major disadvantages of having the courts resolve ambiguities is that they resolve them for ever and ever; only statutory amendment can produce a change.

Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511, 517 (1989).

factor" of handler use of milk in adjusting producer prices; and, finally, that the amendments destroy uniformity of price.

Because we find that the arguments concerning the use of a "prohibited factor," and the destruction of uniformity of price are clearly without merit, we reject them summarily. We will, however, address plaintiffs' contentions that the amendments are not rational or supported by the evidence and that they are not based on an economic service of benefit to the handlers.

Due to the fact that this is a consolidated case brought by plaintiffs challenging the Secretary's rulemaking pursuant to both the AMAA and the Administrative Procedure Act, 5 U.S.C. §§ 701-06, this Court's review is governed by two sets of standards. In *Defiance Milk Products, supra*, this Court held, "[o]ur review of the Secretary's decision is limited to whether the decision is in accordance with law and whether the decision is supported by substantial evidence. *See Lehigh Valley Farmers v. Block*, 829 F.2d 409, 412 (3d Cir. 1987); *Suntex Dairy v. Block*, 666 F.2d 158, 162 (5th Cir.), *cert. denied*, 459 U.S. 826 (1982)." *Defiance Milk Prods.*, 857 F.2d at 1068. And section 706(2)(A) of the Administrative Procedure Act requires affirmance of the challenged regulation so long as it was not "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." In *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281 (1974), the Supreme Court explained that "[u]nder the 'arbitrary and capricious' standard the scope of review is a narrow one. A reviewing court must 'consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. . . .'" *Id.* at 285 (quoting *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971). Further, "[w]hile we may not supply a reasoned basis for the agency's action that the agency itself has not given, *SEC v. Chenery*

Corp., 332 U.S. 194, 196 (1947), we will uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Bowman*, 419 U.S. at 285-86. We conclude that the Secretary's decision satisfies both of these standards.

Substantial evidence in the record establishes that the Secretary's decision to reconfigure the location adjustments within the marketing area was rational. The Secretary heard several witnesses who testified as to the conditions of the milk market in Southern Michigan. *See* 54 Fed. Reg. 26,769-72 (1989). Evidence from the witnesses' testimony and other sources, established that since 1977, the last location adjustment inquiry made by the Secretary, a number of changes have occurred in the relevant marketing area that warranted a restructuring of the zones. The evidence shows that while the population in the marketing area as a whole was stable, sales of Class I product dropped over 10%, and production of milk increased more than 10%. *See* 54 Fed. Reg. 26,773 (1989). Further, evidence in the record indicates that Detroit, the ultimate consumption area under the Order, suffered a 12% population decline between 1976 and 1986, and that Class I sales in Detroit decreased by over 35%. *See* 54 Fed. Reg. 26,772 (1989). Finally, the evidence showed that two distributing plants had closed in the Detroit area. *Id.*

To meet the changed conditions, the Secretary chose to create three mainly self-sufficient zones with small location adjustments from zone to zone. *See* 54 Fed. Reg. 26,772-73 (1989). The manner in which the Secretary chose to remap the zones is largely a matter of his discretion; the Secretary's choice of a three-zone system will be upheld unless it was not a rational choice based on substantial evidence in the rulemaking. The Secretary specifically noted that under the new zoning arrangement "plants in the same general area will be treated alike and pricing equity among these competing handlers will continue." 54 Fed. Reg. 26,773 (1989). We

find that the Secretary's decision was rationally related to and supported by the evidence.

The Secretary also determined that the mileage rates needed to be changed from 1 cent to 2.25 cents per hundredweight per ten miles. After hearing evidence from witnesses concerning this proposed amendment, 54 Fed. Reg. 26,775-77, the Secretary increased rates because he determined that the existing rate seriously overstated the value of milk at distant locations, and was inadequate to reflect hauling costs incurred under current conditions. 54 Fed. Reg. 26,777 (1989). It should also be noted that plaintiffs in this case agreed that the 1 cent per hundredweight mileage rate understated the cost of transportation. *Id.* The question of how much to increase the mileage rate is within the discretion of the Secretary so long as it is supported by substantial evidence, the proper economic factors, and is not arbitrary or capricious. After reviewing the record, we are satisfied that it contains substantial evidence to support the Secretary's decision to adjust the mileage rate location adjustment, that the appropriate factors were considered by the Secretary, and that the decision is neither arbitrary or capricious.

Next, the plaintiffs contend that the Secretary's amendments do not comport with the law because they are not related to economic benefits obtained by milk handlers. A showing of economic service of benefit, "requires the Secretary to demonstrate, as a prerequisite to imposing the burden of price differentials on handlers, that the burden is imposed for the purpose of reflecting an economic service of benefit to the handler." *Fairmont Foods Co. v. Hardin*, 442 F.2d 762, 767 (D.C. Cir. 1971). The economic service of benefit requirement is not mandated by the text of the Act itself; however, in *Zuber v. Allen*, 396 U.S. 168 (1969), the Supreme Court held:

> The statute before us does not contain a mandate phrased in broad and permissive terms. Congress has spoken with particularity and provided specifically enumerated differentials, which negatives the conclusion that it was thinking only in terms of historical considerations. The prefatory discussion in the House Report emphasizes the congressional purpose to confine the boundaries of the Secretary's delegated authority. In these circumstances an administrator does not have "broad dispensing power." The congressional purpose is further illumined by the character of the other statutory differentials for "volume," "grade or quality," "location," and "production," *all of which compensate or reward the producer for providing an economic service of benefit to the handler.*

Zuber, 396 U.S. at 183 (emphasis added) (footnotes and citations omitted).

In *Fairmont Foods, supra*, the D.C. Circuit, addressing the language of *Zuber*, held:

> On judicial review, it is the function of the court to assure that the Secretary has set forth findings and reasons which fully justify any differential from the uniform price, —and justify them on the limited grounds permitted by Congress, which allow increases in minimum prices to reflect economic service of benefit to handlers. . . . The court must invalidate orders resting on any basis other than such economic reasons, —whether the orders are ascribable to whim, which seems unlikely; or to response to the influence of major farm interests, which may be more likely; or merely bureaucratic error in supposing that the wisdom of experts as to what is needed in the public interest must be given dominance over the constraint of Congress.

Fairmont Foods, 442 F.2d at 766.

In *Schepps Dairy, Inc. v. Bergland*, 628 F.2d 11, 18 (D.C. Cir. 1979), the District of Columbia Circuit reiterated the limits on the Secretary's authority: "the statutory listings of permissible adjustments to price uniformity among producers and handlers, respectively, are exhaustive, and the deviations authorized are solely 'for the purpose of reflecting an economic service of benefit to the handler.'" (quoting *Fairmont Foods*, 442 F.2d at 767). The Seventh Circuit adopted this position in *Borden, Inc. v. Butz*, 544 F.2d 312, 316 (7th Cir. 1976), holding, "[t]he Secretary is authorized to make only certain adjustments and these are to 'compensate or reward the producer for providing an economic service of benefit to the handler.' *Zuber, supra*, 396 U.S. at 184."

The Administrative Law Judge who ruled on the plaintiff handlers administrative petition, addressed this issue and concluded that the Secretary's amendments were illegal since they were not based on compensation to producers for providing an economic service of benefit to the handlers. The Judicial Officer rejected the ALJ's conclusion holding:

> The statute . . . imposes no restriction on the purposes for which location adjustments are made, literally requiring only a showing of a difference "in location at which delivery of such milk is made." . . . In particular, petitioners and the ALJ . . . rely on dicta in *Zuber* in which the Court said that location adjustments "compensate or reward the producer for providing an economic service of benefit to the handler."

In re Lansing Dairy, 1991 WL 313838, at *61 (footnotes and citations omitted). The Judicial Officer, relying on his earlier decision in *In re Borden, Inc.*, 46 Agric. Dec. 1315 (1987), continued,

> *Borden* demonstrates that location adjustments can be adopted for any of the broad objectives of the Act, *e.g.*, orderly marketing conditions; ensuring and adequate supply of fluid milk; uniformity as to producers or handlers; location value of milk; increased hauling costs; or a variety of circumstances. . . . *Borden* also examines the legislative history of the Act, which supports the Secretary's ability to fashion location adjustments for the greatest number of reasons. Therefore, petitioner's arguments, and the ALJ's conclusions, both of which characterize the Secretary's power to make location adjustments as being very limited, are not correct.

In re Lansing Dairy, 1991 WL 313838, at *62 (citations omitted). However, the Judicial Officer's attempt seemingly to back away from the "dicta" in *Zuber* and to expand greatly the Secretary's power to make location adjustments is contradicted not only by the decisions of several courts of appeals, but by his own decision in *Borden* as well, where he noted:

> In the absence of the legislative history, it could have been argued that a mere difference in location is sufficient reason to require one handler to pay higher prices than another governed by the same order. The legislative history shows that, in addition to meeting the literal language of the Act (by basing a difference in price on a difference in location), the difference in price must also be based on economic benefit to the handler paying a higher price . . . .

In re Borden, 46 Agric. Dec. at 1393 n.11.

The Judicial Officer cannot redefine the grant of the Secretary's authority. The Supreme Court has held and the Judicial Officer has acknowledged that the Secretary can make

location adjustments for an exclusive, statutorily enumerated number of reasons; and, that those reasons must be supported by economic service of benefit to the handlers. Therefore, we reject the Judicial Officer's assertion that "location adjustments can be adopted for any of the broad objectives of the Act."

Having previously found that the Secretary's findings in the rulemaking record and his decision to amend the location adjustments to Order 40 are supported by substantial evidence supporting his decision to amend the location adjustments to Order 40, it is now our task to determine whether the Secretary has justified them "on the limited grounds permitted by Congress, which allows increases in minimum prices to reflect economic service of benefit to handlers. . . ." *Fairmont Foods*, 442 F.2d at 766. We conclude that the Secretary's decision, while not necessarily conforming to the letter of this requirement, is sufficiently in compliance with its spirit as not to require reversal.

The evidence in the record is not as clear as it might be on this point, but the Secretary appears to have taken the position, and the record supports a finding, that milk delivered to plants in the western and northern regions is now worth more than it was in 1977 because of increased consumption in those areas. The fact that the milk is now of greater worth is sufficient to provide the economic service of benefit required to satisfy the requirements of the Act. That producers for several years may have been delivering to handlers milk worth more than the producers were receiving for it does not prohibit the Secretary, even if belatedly, from recognizing this fact and restructuring location adjustment zones to compensate the producers for the economic service they are providing.

VI.

Because we conclude that the Secretary's interpretation of the AMAA, that he need not undertake a § 608c(18) economic analysis before modifying location adjustments pursuant to 608c(5), is rational and not in opposition to the intent of Congress in enacting the AMAA, we REVERSE the district court's grant of summary judgment to the plaintiffs in this action. Since the district court's decision is reversed, there is no longer a need for the Secretary to conduct an additional rulemaking to repromulgate the location adjustments; therefore, the district court's order in this matter is VACATED.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

FARMERS UNION MILK MARKETING COOPERATIVE, *et al.*,

Plaintiffs,

v.

EDWARD R. MADIGAN, SECRETARY OF AGRICULTURE,

Defendant, and

PRODUCERS EQUALIZATION COMMITTEE,

Intervenor-Defendant.

File No. 2:89-CV-281
Hon. Benjamin F. Gibson

OPINION

Consolidated with

LANSING DAIRY, INC., *et al.*,

Plaintiffs,

v.

EDWARD R. MADIGAN, SECRETARY OF AGRICULTURE,

Defendant.

/

File No. 5:91-CV-104
Hon. Benjamin F. Gibson

OPINION

This case is before the Court on cross-motions for summary judgment submitted by plaintiffs Farmers Union Milk Marketing Cooperative *et al.* ("FUMMC")[1], plaintiffs Lansing Dairy Inc., Liberty Dairy Company, and Frigo Cheese ("Lansing plaintiffs"), defendant Madigan, Secretary of the U.S. Department of Agriculture ("the Secretary"), and intervenor-defendant Producers Equalization Committee ("PEC"). This Court is being asked to review a formal rulemaking of the Secretary to determine whether certain amendments to a milk marketing order were made pursuant to statutory authority and whether the decision to promulgate such rules was supported by substantial evidence. The Court is also being called upon to review the agency's own internal review of the rulemaking procedure, conducted pursuant to a petition submitted by the Lansing plaintiffs, to determine whether the Judicial Officer's final decision to uphold the rules was arbitrary, capricious, or an abuse of discretion.

Four key issues have been presented for the Court's consideration. First, the Court must determine whether the Secretary, in promulgating the contested amendments, should have applied certain factors outlined in section 608c(18) of the Agricultural Marketing Agreement Act ("AMAA") or whether other sections of the AMAA enabled him to make the regulations without undertaking the section 608c(18) analysis. Second, the Court must determine whether the Secretary's regulations fix milk prices based upon the use to which that milk is put and whether such a scheme is statutorily impermissible. Third, the Court must determine whether adjustments promulgated by the Secretary must provide an economic service of benefit to handlers and whether the amendments at issue did, in fact, provide such a benefit.

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[1] This group of plaintiffs includes Manitowoc Milk Producers Association which was recently given leave to intervene as a party plaintiff.

Finally, the Court must determine whether the regulations are supported by substantial evidence or whether the Secretary's economic and demographic data were skewed to such an extent that the Court should find any conclusions resting upon this data to be irrational.

I.

This case involves price amendments made to the Southern Michigan Federal Milk Marketing Order, 7 C.F.R. Part 1040 ("Order 40"). These amendments were made pursuant to formal rulemaking procedures which included a public hearing after notice to all interested parties. The hearing was held on May 24, 1988. Afterwards, the administrator of the Agricultural Marketing Service filed a recommended decision with the hearing clerk of the United States Department of Agriculture. The Secretary adopted this proposal in a decision published on June 26, 1989, (54 Fed. Reg. 26728). The final rule was published on July 12, 1989 (54 Fed. Reg. 29327), and the regulations took effect in September 1989.

In September of 1989, the FUMMC plaintiffs, a group of producers located outside of the southern Michigan milk marketing region, filed suit in the Northern Division of this district challenging the amendments to Order 40. The Lansing plaintiffs, milk processors or "handlers" located within the region, filed a similar motion in the Southern Division of this district. The cases were consolidated and the PEC was granted leave to intervene as a party defendant. In an Opinion and Order of October 2, 1989, this Court dismissed FUMMC's complaint saying that the statute allowed only handlers (and not producers like FUMMC) to challenge the regulations. This Court also dismissed the Lansing plaintiffs' case, saying that the handlers failed to first pursue their administrative remedies. The Lansing plaintiffs then pursued

administrative remedies while the FUMMC plaintiffs appealed this Court's dismissal to the Sixth Circuit. The Sixth Circuit reversed, stating that FUMMC was a proper plaintiff. In the meantime, the Lansing plaintiffs exhausted their administrative remedies and returned to this Court.[2] This Court again consolidated the two cases. At a status conference held on Wednesday, November 13, 1991, the Court and the parties determined that as there were no material issues of fact in dispute, the case could best be handled through cross-motions for summary judgment. The parties submitted briefs, and a hearing on the motions was held on Monday, March 2, 1992.

II.

Summary judgment is appropriate only where no genuine issue of fact remains to be decided so that the moving party is entitled to judgment as a matter of law. *Atlas Concrete Pipe Inc. v. Roger J. Au & Son, Inc.* (*In re Atlas Pipe, Inc.*), 668 F.2d 905, 908 (6th Cir. 1982). There is no material issue of fact for trial unless, in viewing the evidence in favor of the nonmoving party, a reasonable fact finder could return a verdict for that party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).

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[2] Lansing plaintiffs did this through a normal course of administrative petitions. *See* 7 C.F.R. § 900.52 *et seq.* They first appealed this decision to an Administrative Law Judge ("ALJ") who entered a decision in Lansing plaintiffs' favor on July 12, 1990. The Secretary appealed this decision to the Judicial officer (whose role it is to handle internal agency appeals from ALJ decisions) who reversed the ALJ and upheld the validity of the amendments to Order 40.

III.

A.

In order to understand this case, it is necessary to examine the mechanism used for the establishment of milk prices. FUMMC plaintiffs are milk producers. The Lansing plaintiffs are milk handlers. Handlers purchase milk from producers. However, the means by which this transaction is handled is quite complex due to the unique market for milk products. Milk which is alike in all other respects varies in price according to the use to which the milk is put. Some milk is distributed in fluid form. This milk, called Class I, commands the highest price. Class II milk is milk that is made into "soft products" such as yogurt and cottage cheese. It is priced lower than Class I milk. Other products with a longer shelf life (such as butter, cheese, and powdered milk) are considered to be Class III; the milk used to produce these products commands the lowest monetary value.

Before the current system of purchasing milk was enacted, producers would often undersell milk in order to obtain a share of the more lucrative fluid (Class I) market, particularly during the Spring when cows produce extra milk. Competition was fierce and the market was very disorderly. The current system was established so that producers would get a uniform price for their milk, regardless of whether the purchaser was going to use it for Class I, II, or III purposes.

The current system ensures that while producers receive a uniform price, handlers pay different rates depending on the ultimate end to which the milk is put. This is done through a device known as the producer settlement fund. Handlers pay a minimum price that is set by regulation directly to the producers. This price is computed by a complex formula but is basically an "average" of prices for milk that is used for all

three classes. Because the price is an average price, some handlers end up paying too much and some end up paying too little. The difference between what they have paid and what the milk they have purchased is worth is made up through the producer settlement fund. Handlers who have bought milk to be used for Class I purposes (and who have thus paid too little) pay money *to* the fund while those who have bought milk, for Class III purposes receive payments *from* the fund.

The minimum blend price paid to the producers is uniform in the sense that it does not vary based on the use to which the milk is put, but there are other factors that affect the amount of money that handlers pay and producers receive for milk. The price is affected by "location adjustments." Milk that is produced far away from the market where it is being sold is less valuable than that which is produced close to the market. Thus, price is adjusted downward as one gets further away from the market. In the southern Michigan milk marketing area, the major market is considered to be the Detroit-Flint-Bay City corridor.

The free market also affects prices to a small extent. Although the minimum price is set by regulation, there is no maximum price. In the winter when milk is relatively scarce, handlers can negotiate premiums called "over-order" price for the sale of milk. Market forces can, therefore, raise the price of milk but cannot lower it. There are other factors which affect the ultimate milk price, but they are not involved in this case.[3]

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[3] Such factors include adjustments for volume, market and production differentials, and adjustments for the grade or quality of milk purchased. *See* 7 U.S.C. §§ 608c(5)(A)(1) and (2), and 608c(5)(B)(ii)(a) and (b).

B.

The amendments to Order 40 being challenged in this lawsuit are two location adjustments. The first, codified at Title 7 Code of Federal Regulations Section 1040.52(a)(1), is a "zone location adjustment." The second, codified at Title 7 Code of Federal Regulations Section 1040.52(a)(2), is a "mileage rate adjustment."

Zone Location Adjustment

The Zone Location Adjustment sets prices within the southern Michigan milk marketing region. Prior to the 1989 amendments, the region was divided into seven zones, each of which had different price adjustments calculated according to the distance of the zone from the major market (Detroit-Flint-Bay City). The price adjustments in these zones (calculated in cents per hundredweight) were 0 cents, -5 cents, -7 cents, -9 cents, -11 cents, -14 cents, and -17 cents. The zone amendment contested in this lawsuit did away with the old zoning scheme and substituted three zones with adjustments of 0 cents, -5 cents, and -7 cents. The effect of this decision was to increase the number of counties that were in the zone that had a 0 cent adjustment. It also had the general effect of raising minimum prices throughout the southern Michigan milk marketing area by eliminating the zones with the highest adjustments.[4]

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[4] Various handlers were affected differently depending upon what their adjustment had been compared to what it became under the new regulations. A few handlers may have even benefitted from the change.

Mileage Rate Adjustment Amendments

The mileage rate sets the price adjustment for producers located outside of the southern Michigan region (*e.g.*, Wisconsin and the upper peninsula). The regulation is based on the shortest highway distance between the plant located outside the region and a point within the region determined by the Secretary. 7 C.F.R. § 1040.52(a)(2). The applicable adjustment rate is based on cents per hundredweight per ten miles. Under the old regulations, the fixed amount was one cent. Under the new regulations, the fixed amount is 2.25 cents. Thus, the producers located outside of the marketing area received a downward adjustment, lowering the price of their milk.

IV.

Both the AMAA and the Administrative Procedure Act ("APA") supply the law which this Court must apply when reviewing the regulations. The AMAA authorizes judicial review of a ruling made by the Secretary to determine whether or not that ruling is in accordance with law. 7 U.S.C. § 608c(15)(B). The APA governs administrative procedures for all agencies. The APA mandates that when a court is reviewing formal rulemaking such as that done in this case, it shall "hold unlawful and set aside agency action, findings, and conclusions found to be . . . unsupported by *substantial evidence.*" 5 U.S.C. § 706(2)(E). Thus, the Court can only overturn the amendments to Order 40 if it finds that the amendments are not supported by substantial evidence. The Court should find that there is substantial evidence to support the rule if a reasonable mind would accept the evidence as adequate to form a conclusion. *Consolidated Edison Co. v. NLRB*, 305 U.S. 197 (1938). The APA requires that the Court consider the whole record and not merely uphold the agency's decision by reference to those parts of the record

which support the agency's decision. *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951).

In addition to reviewing the actual rulemaking, this Court must review the agency's own internal review of the rulemaking which was conducted at the request of the handlers.[5] The handlers were initially successful in getting an Administrative Law Judge (ALJ) to rule that Order 40 was not valid, but the ALJ's position was reversed by the Judicial Officer. When reviewing the Judicial Officer's decision, this Court may set aside agency findings of fact if the findings are arbitrary, capricious, or an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(a).

Because one of the Lansing plaintiffs' claims is that the amendments to Order 40 are not proper under the AMAA, this Court must necessarily review the Secretary's interpretation of the statute. The Supreme Court has held that courts should treat an agency's interpretation of its own enabling statutes deferentially. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). This does not mean that a court should automatically accept any statutory construction that an agency adopts. A court must first apply the traditional tools of statutory construction to determine the intent of Congress as expressed through the statute. *NLRB v. United Food & Commercial Control Workers Union, Local 23*, 484 U.S. 112 (1987). Such Congressional intent is controlling and must be followed when it can be determined. *Id.* When, however, the statute is "silent or ambiguous with respect to the specific issue," the Court must then follow the agency's interpretation unless that

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[5] The handlers are statutorily required to seek internal agency review before petitioning the court for review of an agency's rulemaking. 7 U.S.C. 608c(15)(B)

interpretation is not a permissible construction of the statute. Chevron at 842-43. The Sixth Circuit has consistently held that considerable weight should be given to an executive department's construction of a statutory scheme and that an agency's interpretation of a statute must be upheld unless "plainly unreasonable." *Oakland County Bd. of Comrs. v. United States Department of Labor*, 853 F.2d 439, 442 (1988) (quoting *National Steel Corp. v. Gorsuch*, 700 F.2d 314, 321 (6th Cir. 1983)). Of course, when Congress has explicitly forbidden the agency from filling in statutory gaps or otherwise curtailed the discretion of the agency, the Court need not defer to the agency's statutory interpretation. *See Chevron* at 843-44.

The Supreme Court has stated that when determining whether a regulation conforms with a statute it should "look to see whether the regulation harmonizes with the plain language of the statute, its origin, and its purpose." *National Muffler Dealers Assn. v. United States*, 440 U.S. 472, 477 (1979). The Court further instructed that other factors to be taken into consideration were "the length of time the regulation has been in effect, the reliance placed upon it, the consistency of the [agency's] interpretation, and the degree of scrutiny Congress has devoted to the regulation during subsequent re-enactments of the statute." *Id.*

V.

The key issue of statutory construction dividing plaintiffs and defendants centers upon the appropriate interpretation of Title 7 United States Code Section 608c(18) which states as follows:

> The Secretary of Agriculture, prior to prescribing any term in any marketing agreement or order, or amendment thereto, relating to milk or its products, *if such term is to*

fix minimum prices to be paid to producers or associations of producers, or prior to modifying the price fixed in any such term, shall ascertain the parity prices of such commodities. *The prices which it is declared to be the policy of Congress to establish in section 602 of this title* shall for the purposes of such agreement, order, or amendment, be adjusted to reflect the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk or its products in the marketing area to which the contemplated marketing agreement, order, or amendment relates. Whenever the Secretary finds, upon the basis of the evidence adduced at the hearing required by section 608b of this title or this section, as the case may be, that the parity prices of such commodities are not reasonable in view of the price of the feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk and its products in the marketing area to which the contemplated agreement, order, or amendment relates, he shall fix such prices as he finds will reflect such factors, insure a sufficient quantity of pure and wholesome milk to meet current needs and further to assure a level of farm income adequate to maintain productive capacity sufficient to meet anticipated future needs, and be in the public interest. Thereafter, as the Secretary finds necessary on account of changed circumstances, he shall after due notice and opportunity for hearing, make adjustments in such prices.

7 U.S.C. § 608c(18) (emphasis added). Plaintiffs claim that the plain meaning of this statute requires that, before the Secretary makes or amends rules affecting price, he must first undertake an analysis of market supply and demand. Plaintiffs contend that the Secretary should not promulgate rules or amendments unless he first finds that supply is inadequate to

meet demand or that some other disorderly market condition has resulted. The Secretary's final rulemaking specifically states that supply was adequate to meet demand prior to the rulemaking. 54 Fed. Reg. 26778. Therefore, plaintiffs maintain that the prerequisites of section 608c(18) have not been met and that it was impermissible for the Secretary to amend Order 40. Defendants claim that the new amendments were promulgated pursuant to section 608c(5) which, they claim, gives the Secretary authority to make location adjustments but does not contain the same economic criteria.

The crux of the disagreement between the parties centers on the interpretation of the term "minimum prices." Section 608c(18) clearly requires that the Secretary take into account the economic factors described within it before undertaking a rulemaking which "fix[es] minimum prices." 7 U.S.C. § 608c(18). Defendants argue that minimum prices are the unadjusted Class I, Class II, Class III, and blend prices set for the region. While defendants acknowledge that the Secretary must consider section 608c(18) criteria when setting or modifying these class or blend prices, they argue that the regulation at issue did not change these prices but, instead, merely altered the adjustments that were made to the minimum price. Thus, defendants claim that the Secretary did not need to consider the requirements of section 608c(18).

Plaintiffs, on the other hand, claim that the term "minimum prices" encompasses the adjusted prices in effect in each zone. According to plaintiffs, any change in the location adjustment affects the minimum price. Therefore, plaintiffs contend that the Secretary must consider section 608c(18) factors before making location adjustments. Plaintiffs acknowledge that section 608c(5) gives the Secretary the *authority* to make location adjustments, but insist that section 608c(5) was meant to work in association with section 608c(18). Plaintiffs argue that section 608c(5) lists the type

of rules that the Secretary has the authority to promulgate but that section 608c(18) tells the Secretary *when* he can promulgate those rules. Plaintiffs maintain that the Secretary cannot ignore section 608c(18) when making location adjustments.

The term minimum price as used in section 608c(18) is nowhere explicitly defined in the statute nor is it defined by the Secretary in the regulations. Neither party could point the Court to any cases defining the phrase or specifically discussing its meaning in section 608c(18). At first blush, it might seem that the phrase "minimum price" as used in section 608c(18) is ambiguous and capable of two interpretations. Were the Court to find that such was the case, it would be required by the *Chevron* doctrine to defer to agency interpretation.[6] After examining the phrase in the context of the rest of the statute, applying traditional canons of statutory interpretation, and viewing the legislative history and the Secretary's own use of the phrase, however, the Court concludes that the term is not ambiguous and that the plaintiffs' definition should prevail.

A statute should be viewed as a whole; therefore, this Court need not confine its interpretation to the one section it is now attempting to construe. *See* 2A *Sutherland Statutory Construction* § 46.05 (1992). It is thus appropriate for the

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[6] The Supreme Court has noted that the legislative history of the AMAA "emphasizes the Congressional purpose to confine the boundaries of the Secretary's delegated authority." *Zuber v. Allen*, 396 U.S. 168, 183 (1969). Thus, it well may be that the Secretary, in implementing Milk Marketing Orders, was not delegated the same broad "gap-filling" authority as the Court found had been given to the Environmental Protection Agency in *Chevron*. The Court need not examine this issue, however, as it determines that even under *Chevron's* deferential standard, the Secretary's interpretation of the AMAA is not permissible.

Court to look at section 608c(5) when interpreting the phrase "minimum price." Section 608c(5)(A) states that the Secretary may fix a minimum price "for each such use classification which all handlers shall pay . . . . " 7 U.S.C. § 608c(5)(A). The statute goes on to state that:

> Such prices shall be uniform as to all handlers, *subject only to adjustments* for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which such milk, or any use classification thereof, is made to such handlers.

7 U.S.C. § 608c(5)(A).

These passages indicate that the *uniformity* of the minimum price, not the minimum price itself, is subject to the location adjustments.[7] Congress could have stated that *minimum prices* were subject to adjustments, implying that the minimum price was a base figure which, when altered by adjustments, became something other than a minimum price. Instead, the statute defines minimum price as a price which is initially uniform. The statute then allows departure from the *uniform* price in order to account for factors such as differences in location. Such a reading indicates that the term minimum price encompasses both the original uniform price and the adjusted price. Since the term minimum price includes adjusted prices, any regulation changing the adjustments in price must necessarily affect the minimum price.

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[7] The Act also provides that the *uniform* prices paid to producers is subject to adjustment for the location at which delivery is made. 7 U.S.C. § 608c(5)(B)(ii)(c).

This reading is further supported by the fact that section 608c(18) states that the price which must be adjusted to reflect economic conditions is "[t]he prices *which it is declared to be the policy of Congress to establish in section 602 of this title*." 7 U.S.C. § 608c(18) (emphasis added). Section 602 is a very general provision which does not limit the purpose of the Act to setting class prices but instead refers to the entire pricing scheme set up under the statute. See 7 U.S.C. § 602. Furthermore, the statute specifically states that the Secretary must undertake economic analyses prior to "*modifying* the price fixed in any such term." Clearly promulgation of a location adjustment is a modification of minimum prices as the imposition of a location adjustment alters the amount of money that handlers pay and producers receive for their milk.

At times, the Secretary seems to have adopted this rationale himself. In a publication put out by the United States Department of Agriculture entitled *Questions and Answers on Federal Milk Marketing Orders*, (AMS-559) (U.S.D.A. pamphlet), the term "minimum price" is defined as "the least amount that proprietary handlers can pay producers for milk." U.S.D.A. pamphlet at 16. This definition necessarily assumes that location adjustments are part of the minimum price as it would violate the marketing scheme for handlers in outlying zones to pay less than the *adjusted* price.

The Secretary, through his Judicial Officer, has even more overtly acknowledged that he has a duty to comply with section 608c(18) when promulgating location adjustments. In the case *In re Borden*, the Judicial Officer opined, "§ 8c(18) of the Act (7 U.S.C. § 608c(18)) *requires* the Secretary to set milk prices, *including location adjustments*, at a level that will, by themselves, 'insure' a sufficient quantity of milk, now and in the future." *In re Borden, Inc.*, 46 Agric. Dec. 1315, slip. op. at 191 (1987), *aff'd sub nom Borden, Inc. v. Yeutter*, No. H-88-1863 (S.D. Tex. Feb. 13, 1990) (emphasis

added). A few pages later, the Judicial Officer writes, "the Secretary is required *by* § *8c(18) of the Act* to make certain that the Class prices *and location adjustments* in every milk order are high enough to attract milk to every part of the marketing area." *Id.* slip op. at 193 (emphasis added).[8] Thus, in *In re Borden*, the Judicial Officer concluded that the Secretary's duties in setting location adjustments was governed by section 608c(18).

Defendants argue that this Court should defer to the agency's position that it can promulgate orders under section 608c(5) of the statute because it has interpreted the statute that way for fifty years. While it is true that consistent agency interpretation of a statute over time might be a factor influencing the Court to defer to the agency's position, there has been absolutely no evidence presented that there is such a fifty year history of agency interpretation. The defendants' briefs both support this contention by referring to the decision of the Judicial Officer in the Lansing plaintiffs' administrative appeal. Administrative Record, Vol. 1. No. 49 at 78-92. While this opinion cites numerous cases for the proposition that courts should defer to agency practice, it cites only one case to show what the agency's practice has been. That case, *In re Borden*, 46 Agric. Dec. 1315 slip op. at 190-93 (1987), *aff'd*, No. H-88-1863 (S.D. Tex. Feb. 13, 1990) does not show that regulations can be promulgated under section 608c(5) *without regard* to section 608c(18). As discussed above, the case clearly indicates that location adjustments are governed by the provisions of section 608c(18). The case also holds that section 608c(5) provides authority for promulgation

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[8] The *In re Borden* case, which also dealt with location adjustments, also lists section 608c(18) among the "relevant provisions" of the statute used to determine the validity of the rulemaking. *In re Borden* at 14 and 18.

of the location adjustments. The fact that the Judicial Officer held that section 608c(5) is a basis for promulgation of a location adjustment does not negate the fact that the requirements of section 608c(18) must also be followed. Read as a whole, *In re Borden* shows that location adjustments are governed by *both* provisions of the statute.

Apparently no court has explicitly dealt with the issue of whether location adjustments must be promulgated pursuant to section 608c(18), but at least one court has implicitly found that location adjustments are part of minimum prices and, as such, are governed by section 608c(18). In *Jones v. Bergland*, the Secretary issued a notice containing proposals for altering location adjustment differentials. The final order that was adopted, instead of merely making location adjustments, also changed the Class I price in the region. Plaintiffs in the case claimed that the order should not go into effect because the original notice dealt only with location adjustments and did not mention that the Class I price might be changed. The Court found that the original notice was sufficient to make the Class I change because it "included a variety of proposals which effectively would have altered the *minimum price* of milk to . . . producers." *Jones v. Bergland*, 456 F. Supp. 635, 643 (E.D. Pa. 1978) (emphasis added). In making this determination, the *Jones* court found that, at least for the purpose of notice, changes in location adjustments were one of several types of changes in minimum price that the Secretary might make.

Finally, the Court finds that the plaintiffs' construction of the statute comports with the purpose of the statutory scheme which is to guide the Secretary in setting prices in order to avoid disorderly market conditions. The legislative history of section 608c(18) indicates that it was enacted "for the guidance of the secretary in fixing milk prices." S. Rep. No. 565, 75th Cong., 1st Sess. 3 (1937). It would be illogical for

Congress to carefully articulate all factors the Secretary must take into account when fixing class prices yet allow location adjustments, which ultimately affect the actual cost of milk, to be adjusted without any guidance whatsoever. This would theoretically allow the Secretary to circumvent the specific Congressional delegation by conducting all market regulation through price adjustments. Thus, the Court finds that the Secretary is required to follow section 608c(18) when promulgating amendments to milk marketing orders.

VI.

Defendants argue that even if the Court finds that they are required to comply with section 608c(18), there is no reason to find noncompliance as the Secretary did take the requisite economic factors into account. The Court finds these arguments unpersuasive. The Secretary has argued throughout rulemaking and in the course of this case that the regulations were promulgated pursuant to section 608c(5) alone. It is therefore clear that the Secretary did not *consider* the factors articulated in section 608c(18) at all.[9] It well may be that,

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[9] The Secretary's final rulemaking contains a statement under the subheading "General Findings" which mirrors the statutory language of section 608c(18). 54 Fed. Reg. 26779. The Court need not determine whether this recitation of economic factors constitutes compliance with the prerequisites of section 608c(18) as the secretary himself has disavowed that the use of the language implied that he had considered the section 608c(18) factors. The Secretary's reply brief states:

> [W]henever the Secretary amends a milk marketing order, he readopts the *entire marketing order as amended*, rather than just the *amendments to* the marketing order. 54 Fed. Reg. 26779. Hence, for those parts of the marketing order that were not within the scope of the amendatory hearing, and which are not being amended, the Secretary relies on the factual findings, legal conclusions, and statutory authority asserted when those existent portions were first

despite the Secretary's findings that there was plenty of milk in the region, the economic conditions are such that rulemaking could have permissibly been undertaken pursuant to section 608c(18). It is not the duty of this Court, however, to determine what conclusion the Secretary would have reached if he had undertaken the appropriate analysis. The record clearly indicates that the Secretary did not take into account factors that Congress dictated he must consider. Therefore, the Secretary's decision must be reversed.

VII.

The Court need not examine the plaintiffs' other arguments, as it finds that the Secretary impermissibly promulgated location adjustments without first examining the factors articulated in section 608c(18) of the AMAA. For the reasons stated above, the Court finds that the Secretary's rulemaking, because it was not based upon statutorily

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adopted or later amended Thus, there is 'canned language' about the factors enumerated in 7 U.S.C. § 608c(18) and 'previous findings and determinations' to support the readoption of the existing class prices (7 C.F.R. 1040.50, .51, and .51a.)

Secretary's reply brief at 11 (emphasis in original).

mandated factors, does not comply with prerequisites established by the AMAA and must be overturned.

s/ Benjamin F. Gibson
BENJAMIN F. GIBSON
U.S. DISTRICT JUDGE

Dated: March 30, 1992

APPENDIX C

UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

In re:	) 90 AMA Docket No. M 40-1
	)
Lansing Dairy, Inc.,	)
Liberty Dairy	)
Company, and Frigo	)
Cheese Corporation,	)
	)
Petitioners	) **Decision and Order**

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Preliminary Statement

This is a proceeding under § 8c(15)(A) of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. § 608c(15)(A)). Petitioners are "handlers" of milk subject to Order No. 40, Milk in Southern Michigan Marketing Area (7 C.F.R. Part 10-40). Petitioners instituted this action to challenge amendments to the Order which revised the location adjustment zones (7 C.F.R. § 1040.52(a)(1)) for the marketing area, and which increased to $.0225 per cwt. per 10 miles the location adjustment rate (7 C.F.R. § 1040.52(a)(2)) for plants outside the zones (see 54 Fed. Reg. 26,768, 26,768-80 (1989), *infra*).

Section 8c(5)(A) of the Act authorizes the Secretary of Agriculture to classify milk in accordance with the form in which it is used by a milk handler (e.g., Class I milk is milk sold as fluid milk; Class II milk is milk sold as "soft" products, such as cottage cheese; and Class III milk is milk sold as "hard" products, such as butter), and to fix "minimum prices for each such use classification which all handlers shall pay ... for milk purchased from producers" (7 U.S.C. § 608c(5)(A)). "Such prices shall be uniform as to all handlers, subject only to adjustments for ... (3) the locations at which delivery of such milk ... is made to such handlers" (id.).[1] (Similar adjustments can be made to the uniform prices paid to producers (7 U.S.C. § 608c(5)(B)(ii)(c)).

That adjustment, called a "location adjustment," can be a negative adjustment to the Class price required to be paid by

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[1] *See generally Vetne, Federal Marketing Order Programs, in* 1 Davidson, Agricultural Law, § 2.35 (1981 and 1989 Cum. Supp.); Brooks, *The Pricing of Milk Under Federal Marketing Orders*, 26 Geo. Wash. L. Rev. 181 (1958).

a handler, thereby reducing the handler's cost. A negative location adjustment recognizes the lower value of milk delivered, e.g., to a handler's supply plant located a considerable distance from the consumption center, where the handler must incur extra hauling costs in delivering milk to the consumption center.

Conversely, a location adjustment can be a positive adjustment to the Class price required to be paid by a handler, thereby increasing the handler's cost, in order to compensate producers for hauling costs incurred in delivering bulk milk to a handler's distribution plant located a considerable distance from the production area. That is, producers delivering milk to such a distant handler receive extra compensation because they have provided an economic service of benefit to the distant handler.

On July 12, 1990, Administrative Law Judge Paul Kane (ALJ) filed an Initial Decision and Order in which he held that the Secretary's action in amending 7 C.F.R. § 1040.52(a)(1) and (2) was not in accordance with law. The ALJ awarded monetary relief, with interest, by ordering that all monies collected as a result of these amendments be returned to petitioners, with interest.

On August 29, 1990, respondent appealed to the Judicial Officer, to whom final administrative authority to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 has been delegated (7 C.F.R. § 2.35).[2] On January 10, 1991,

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[2] The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1952), *reprinted in* 5 U.S.C. app. at 1280 (1988). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate

petitioners replied to respondent's appeal and filed a cross-appeal. On February 5, 1991, respondent responded to the cross-appeal. (Intervenor Producers Equalization Committee (PEC) filed a brief supporting respondent's appeal on October 29, 1990.) The case was referred to the Judicial Officer for decision on February 6, 1991.

Based upon a careful consideration of the entire record, I agree with respondent's position on appeal that the Petition should be dismissed.

Before setting forth Findings of Fact, the Secretary's actual Order No. 40 rulemaking decision is restated and the following brief background information is taken from *Schepps Dairy, Inc. v. Bergland,* 628 F.2d 11, 13-16 (1979) (footnotes omitted):

> I. *HISTORICAL AND ADMINISTRATIVE BACKGROUND*
>
> A. *Federal Milk-Marketing Order*
>
> For nearly a half-century, the Secretary of Agriculture has pursued a broad and vital role in the establishment of the prices that many handlers pay many producers of milk. The methodology of federal milk price-fixing has roots extending even deeper in our national economic history. As may readily be expected, a brief sketch of the genesis and evolution of federal milk-marketing orders will serve this appeal by placing

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litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program).

the legal issues in proper social as well as regulatory perspective.

As everybody knows, raw milk is a highly perishable commodity. Without refrigeration, it is storable for only very brief periods and transportable for only very short distances. In the early 1900's, dairy farmers—"producers" —usually were thus compelled to deal with the one or the very few local milk processors available, who accordingly exercised some degree of monopsony power. Moreover, the milk industry was characterized by seasonal overproduction; as the Supreme Court has explained,

> [i]n order to meet fluid demand which is relatively constant, sufficiently large herds must be maintained to supply winter needs. The result is oversupply in the more fruitful months. The historical tendency prior to regulation was for milk distributors, 'handlers,' to take advantage of this surplus to obtain bargains during glut periods.

To correct this discrepancy in bargaining power, Congress enacted legislation enabling dairy farmers to form cooperatives to pool their milk and eliminate overproduction. These cooperatives established classified pricing schemes based on the use to be made of the milk. They priced milk destined for fluid consumption—class I milk—higher than milk slated for manufacture into dairy products such as cheese—class II milk. Though a small part of the price differential might represent cost differences, the bulk was attributable simply to a desire to exploit the relatively inelastic demand for fluid milk without unduly inhibiting the demand for manufactured milk products. To spread the benefits of this pricing strategy among their members, cooperatives would

multiply class I prices by the amount of fluid milk sold, and class II prices by the amount of manufactured milk sold, and divide the sum of these products by the total quantity of milk sold to arrive at the "blend price" its members would receive for delivered milk.

The profitability of this system encouraged dairy farmers to increase their output. It also invited farmers selling a higher percentage of their milk for fluid purposes than the cooperative generally to abandon the pooling arrangement and deal individually, and in this manner to realize more than the blend price. This in turn germinated disputes among cooperatives and handlers who dealt with free-lance farmers, and as a consequence, milk markets became highly unstable during the late 1920's.[3] During the Great Depression, demand for fluid milk fell, prices declined drastically and the entire cooperative system collapsed, to the farmers' severe detriment.

Congress reacted by passing the Agricultural Adjustment Act of 1933, which established a licensing system designed to "reestablish prices to farmers at a level that will give agricultural commodities a purchasing power ... equivalent to the purchasing power of agricultural commodities in the base period," which extended from August, 1909, to July, 1914. To supplement the provisions of that legislation, and to confine the Secretary of Agriculture's authority within the constitutional limits that very recently had been driven home by the Supreme Court, Congress amended the Agricultural Adjustment Act in 1935. The 1935

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[3] In Kessel, *Economic Effects of Federal Regulation of Milk Markets*, 10 J. Law & Econ. 51, 52 (1967), reference is made to "milk strikes and the associated violence ...."

amendments to Section 8(3) of the 1933 Act were basically carried over into Section 8c of the new Agricultural Marketing Agreement Act of 1937, which largely controls the instant dispute.

The present statutory provisions can be seen as a shoring, with the power of the Federal Government, of the classified pricing scheme initiated by the cooperatives. Not all of the milk industry is federally regulated, however. Only if producers and handlers so agree, or if two-thirds of the producers or the producers of two-thirds of the output in the area wish, are federal price controls imposed. In each regulated milk-marketing area, class I and II minimum prices are established. No maximum prices are set; producers are free to bargain with handlers for better deals.

Producers are largely indifferent to whether their milk is used for class I or II purposes, for they receive a blend price. On the other hand, processors must pay at least the minimum class I and II prices. The variance among handlers in the percentages of milk assigned to fluid and manufacturing purposes means that a handler may pay more or less than the producer from whom he is purchasing receives. Any handler who uses more than the average percentage of class I milk must pay the difference over the blend price into a "producers-settlement fund," from which a handler who uses less than the average percentage of class I milk is compensated.

Minimum class I prices, however, are not necessarily uniform across the entire area covered by a milk-marketing order. The requirement of uniform prices is statutorily subject to adjustments "which compensate or reward the producer for providing an economic service or

benefit to the handler." Milk-producing regions covered by an order are often distant from consuming centers, and chief among the adjustments enumerated in the Act is one for "the locations at which delivery of ... milk ... is made to ... handlers." The location adjustment honors the fact that a handler who receives milk near consuming centers has a more valuable commodity than a handler who takes in milk in an area further out where it is produced cheaply, but who must undertake the burden of transporting the processed product to consumer markets.

Secretary's Decision: "Milk in the Southern Michigan Marketing Area"
(54 Fed. Reg. 26,768, 26,768-80 (1989))

The basis for petitioners' action, of course, is the Secretary's decision in the Southern Michigan Federal Milk Order; the lawfulness of which may be determined only upon the basis of evidence before the Secretary in that rulemaking record—and not upon evidence received at a § 8c(15)(A) proceeding. The Secretary's decision, insofar as it relates to the location adjustments at issue here, is reprinted in its entirety below (without indentations), with cut-in folios, that is, the original page numbers from the Federal Register are included in this text at the appropriate places, set off by brackets (see 54 Fed. Reg. 26,768, 26,768-80 (1989)), as follows:

[26,768]

Agricultural Marketing Service

7 CFR Part 1040

[Docket No. AO-225-A39; DA-88-047]

Milk in the Southern Michigan Marketing Area; Decision on Proposed Amendments to Marketing Agreement and to Order

AGENCY: Agricultural Marketing Service, USDA

ACTION: Proposed rule.

SUMMARY: This decision changes the plant location adjustments to prices under the Southern Michigan order. The amendments were proposed by four dairy farmer cooperatives that supply about 87 percent of the market's milk.

The changes would replace the current seven pricing zones with just three zones (zero, minus five cents, and minus seven cents) and increase the rate of adjustment at plants outside the zones from one cent to 2.25 cents per hundredweight per 10 miles or fraction

[26,769]

thereof. The zone and location adjustments apply to Class I milk prices to handlers and to uniform prices to producers.

Also, a larger direct-delivery differential payment of 10 cents per hundredweight would be required for milk delivered to pool plants in a three-county area

(metropolitan Detroit). Currently, two rates are applicable in portions of two counties.

Another change would use 0.115 rather than 0.113 as the factor that is multiplied times a specified butter price to determine the butterfat differential used for pricing milk under the order.

The amendments are based on industry proposals and a record of a public hearing held at Romulus, Michigan, on May 24, 1988. The amendments are necessary to reflect current marketing conditions and to maintain orderly marketing in the Southern Michigan marketing area. Cooperative associations will be polled to determine whether producers favor issuance of the amended order.

FOR FURTHER INFORMATION CONTACT: Richard A. Glandt, Marketing Specialist, USDA/AMS/Dairy Division, Order Formulation Branch, Room 2968, South Building, P.O. Box 96456, Washington, DC 20090-6456, (202) 447-4829.

SUPPLEMENTARY INFORMATION: This administrative action is governed by the provisions of Sections 556 and 557 of Title 5 of the United States Code and, therefore, is excluded from the requirements of Executive Order 12291.

The Regulatory Flexibility Act (5 U.S.C. 601-612) requires the Agency to examine the impact of a proposed rule on small entities. Pursuant to 5 U.S.C. 605(b), the Administrator of the Agricultural Marketing Service has certified that this action will not have a significant economic impact on a substantial number of small

entities. The amended order will promote more orderly marketing of milk by producers and regulated handlers.

Prior documents in this proceeding:

Notice of Hearing: Issued April 29, 1988; published May 4, 1988 (53 FR 15851).

Extension of Time for Filing Briefs: Issued July 19, 1988; published July 22, 1988 (53 FR 27699).

Recommended Decision: Issued February 21, 1989; published February 24, 1989 (54 FR 7938).

Correction to Recommended Decision: published March 10, 1989 (54 FR 10214).

Extension of Time for Filing Exceptions: Issued March 16, 1989; published March 21, 1989 (54 FR 11545).

Preliminary Statement

A public hearing was held upon proposed amendments to the marketing agreement and the order regulating the handling of milk in the Southern Michigan marketing area. The hearing was held, pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), and the applicable rules of practice (7 CFR Part 900), at Romulus, Michigan, on May 24, 1988. Notice of such hearing was issued on April 29, 1988 and published May 4, 1988 (53 FR 15851).

Upon the basis of the evidence introduced at the hearing and the record thereof, the Administrator,

Agricultural Marketing Service, on February 21, 1989, filed with the Hearing Clerk, United States Department of Agriculture, his recommended decision containing notice of the opportunity to file written exceptions thereto.

The material issues, findings and conclusions, rulings, and general findings of the recommended decision are hereby approved and adopted and are set forth in full herein, subject to the following modifications:

1. Under the heading "1. Changing the location adjustment and direct-delivery differential zones in the order.", seventeen new paragraphs are added after paragraph 74.

2. Under the heading "2. The location adjustment rate applicable to plants located outside location adjustment zones.":

a. Two new paragraphs are added after paragraph 32.

b. Eight new paragraphs are added after paragraph 41.

The material issues on the record of the hearing relate to:

1. Changing the location adjustments and direct-delivery differential zones in the order.

2. Changing the rate used to determine location adjustments at locations outside the zoned area.

3. Changing the factor used in the computation of the butterfat differential.

Findings and Conclusions

The following findings and conclusions on the material issues are based on evidence presented at the hearing and the record thereof:

1. *Changing the location adjustment and direct-delivery differential zones in the order.* The order should be amended to provide a single direct-delivery zone and three zones for pricing milk at Class I and uniform prices.

The Producers' Equalization Committee (PEC) proposed changing the structure of the existing pricing zones and direct-delivery differential zones.

The PEC is composed of four cooperative associations, namely, Independent Cooperative Milk Producers Association, Michigan Milk Producers Association (MMPA), National Farmers Organization, and Southern Milk Sales. Together, these four associations market approximately 87 percent of the milk pooled on Order 40 and supply about 87 percent of the market's fluid milk sales.

The PEC proposed that the present seven zones, all in the lower portions of Michigan, be replaced with three zones.

The lower portion of Michigan is currently divided into seven geographically specified zones consisting of bands of counties grouped essentially on the basis of distance from the heavily populated corridor which encompasses Detroit, Flint and Bay City.

The above pricing structure has been in effect for the Southern Michigan market since September 1, 1977. The Class I price to handlers and the uniform price to producers is adjusted as follows:

Zone	*Adjustment*
1	No adjustment.
2	Minus 5 cents.
3	Minus 7 cents.
4	Minus 9 cents.
5	Minus 11 cents.
6	Minus 14 cents.
7	Minus 17 cents.

The PEC proposed that the lower portion of Michigan be comprised of three zones, as follows: Zone 1, a large southeastern segment, would contain the counties of Clinton, Genesee, Gratiot, Hillsdale, Huron, Ingham, Jackson, Lapeer, Lenawee, Livingston, Macomb, Monroe, Oakland, Saginaw, Sanilac, St. Clair, Shiawassee, Tuscola, Washtenaw, Wayne, and Bay (except Gibson, Mount Forest, Pinconning, Garfield and Fraser townships)

Zone 2, a large southwestern segment, would include Allegan, Barry, Berrien, Branch, Calhoun, Cass, Eaton, Ionia, Kalamazoo, Kent, Montcalm, Muskegon, Ottawa, St. Joseph, and Van Buren Counties; and

Zone 3, north of Zones 1 and 2, would be comprised of Bay County (all townships excluded from Zone 1), and the counties of Alcona, Alpena, Antrim, Arenac, Benzie, Charlevoix, Cheboygan, Clare, Crawford, Emmet, Gladwin, Grand Traverse, Isabella, Iosco, Kalkaska, Lake, Leelanau, Manistee, Mason, Missaukee, Mecosta,

Midland, Montmorency, Newaygo, Oceana, Ogemaw, Osceola, Oscoda, Otsego, Presque Isle, Roscommon and Wexford.

[26,770]

The Class I prices to handlers and the uniform price to producers would be adjusted as follows:

Zone	*Adjustment*
1	No adjustment.
2	Minus 5 cents.
3	Minus 7 cents.

The PEC also proposed expanding the area in which the direct-delivery differential is applicable from two counties (Wayne and Oakland Counties) to include Macomb County. The rate of the direct-delivery differential would be 10 cents in all three counties. At the present time, a 10-cent rate applies to milk received at pool plants in Wayne County and parts of Oakland County. A 4-cent rate presently applies to most of Oakland County.

Also proposed by the PEC was a proposal to increase the location adjustment rate from one cent to 2.25 cents applicable at plants located outside the marketing area. Both the direct-delivery differential and the location adjustment rate applicable to distant plants will be discussed following a discussion dealing with the restructure of the present location adjustment zones.

A witness for the PEC testified that the proposed changes to the pricing structure of the Southern Michigan order are necessary because of the substantial changes that have occurred in the past decade. He said that a 21-cent difference (17 cents for Zone 7 plus a 4-cent direct-

delivery differential) was created in September 1977 to facilitate the movement of milk from western Michigan to southeast Michigan. Also a 27-cent difference was created at that time (17 cents for Zone 7 plus a 10-cent direct-delivery differential) to move milk from northern Michigan to southeast Michigan. In 1977, he said, these differences in prices fairly reflected the cost of transporting milk to a market (Detroit metropolitan area) that was considered to be a deficit production area.

The PEC spokesman said that packaged milk sales by handlers located in the proposed Zone 1 (21 counties) was approximately 156.0 million pounds and that milk production for this same area was about 160 million pounds. He said that handlers also require milk for non-fluid milk products such as cottage cheese and yogurt. This 21 county area in 1977, he said, included four supply plants at Adrian, Ovid, Chesaning and Sebewaing, Michigan, which processed reserve milk supplies for Class III products.

The witness for the PEC said that the period from 1977 to 1987 can be described as a period of deteriorating packaged fluid milk sales by Order 40 pool plants. Fluid milk sales for this period, he said, decreased from approximately 2.218 billion pounds per year to 1.976 billion pounds or a decrease of 242 million pounds.

Proponent's spokesman testified that this decline in sales can be attributed to a depressed economy, declining population, and declining per capita consumption. Local plants today, he said, are not distributing fluid milk products into as many distant markets as in the past.

The witness for the PEC said that the distribution of fluid milk sales within Southern Michigan has also

changed. Exhibit No. 9, for example, shows that in 1977, plants located in the two counties where the direct-delivery differential applies, accounted for 57 percent of Order 40's sales. Plants located within the present base zone and the minus 5-cent zone accounted for 25 percent of the total sales and the balance of sales (18 percent) were by plants in the minus 9-cent, minus 11-cent and beyond zones. By December 1987, he said, for these same zones, the percentages were 41, 27 and 32, respectively.

Proponent's witness testified that during this 10-year period, annual sales volume in the area now comprising the plus 10-cent direct-delivery differential declined by 445 million pounds whereas sales in the minus 9-cent and beyond zones increased by 217 million pounds resulting in a net loss of 242 million pounds of fluid milk sales for the entire market. He said that this redistribution of the local market's fluid milk sales represents a reversal of the previous trend in sales. Less packaged milk is being supplied to other in-state markets by Detroit metropolitan handlers, via distributors, and more of the packaged sales in the Detroit metropolitan area is being supplied by plants located outside the plus 10-cent direct-delivery differential area. The closing of two large distributing plants during the last 10 years, he said, has also contributed to the reduced fluid milk sales by plants located in the plus 10-cent direct-delivery differential area.

The PEC witness testified that milk production for the entire Southern Michigan market and by county has also changed during the last 10 years. He said that Exhibit 15 shows that for December 1987, milk production in the proposed Zone 1 area was within one percent of the production level of December 1977 and

that in the proposed minus 5- and minus 7-cent zones, production had increased 14 percent when compared to 1977. He indicated that although milk production has remained fairly constant in the counties proposed for Zone 1, the monthly fluid milk needs of this area have decreased by almost 39 million pounds since 1977.

The spokesman for the PEC testified that more of the milk production in the proposed Zone 1 area is available to supply the fluid market today than there was in 1977. In his view, this is because of the closing of two manufacturing plants located in Sebewaing and Chesaning, Michigan. These two facilities, he said, acquired the majority of their milk supply from farms located in the central zone. His belief is that the central zone should no longer be considered a deficit production area and therefore, the spread in prices paid to producers located in different areas of the market should be reduced.

The PEC witness indicated that changes in the location adjustment rates should also be made to more properly align Class I prices between adjoining markets. Furthermore, it is his behalf that prices within the market should be aligned to ensure comparable pricing treatment for plants which are similarly located but regulated by another Federal order.

The spokesman for the PEC expressed the view that because of the daily and monthly fluctuation in sales, it is necessary to design location adjustments so that the seasonal and operating reserves of the fluid market can be handled in an efficient manner with the least cost to those producers who are balancing the market.

The PEC witness indicated that the location adjustment rate for the proposed Zone 2 of minus 5 cents

results in a Class I differential of $1.70 that applies to regulated handlers in the northern zone of the Indiana market (Order 49). He said that a minus 5-cent location adjustment also more closely aligns the producer uniform prices for Orders 40 and 49 in southwest Michigan. A minus 7-cent location adjustment in Zone 3, he said, recognizes the fact that the plants are located further from the major consumption areas of Lansing, Flint, and Bay City-Saginaw.

The PEC proposal, in the witness' view, would expand the central zone to include the cities of Lansing and Jackson in order to recognize the overlapping of route distribution and the competition for fluid milk sales among plants located in Lansing and Jackson with other plants presently included in the central zone. In his view, a zero location adjustment for Lansing and Jackson better aligns the Class I price among the competing handlers in the local markets and also

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better aligns the Order 40 Class I differential at these locations with the Order 33 (Ohio Valley) Class I differential of $1.80 for northwest Ohio.

The witness for the PEC testified that, in his opinion, the proposed reduction in the location adjustment rates for the more distant zones acknowledges that there is an increasing demand for milk by processing plants located in those areas which were previously considered secondary markets.

The PEC, he said, believes that these location adjustment rates should be designed so that producer supplies will move to plants when needed in the most efficient way. The proposed minus 5-cent location

adjustment rate for Zone 2 will provide better inter-market price alignment. Furthermore, the witness said, the historical price relationship between Order 40 and surrounding markets was altered when the Class I differentials were changed pursuant to the Food Security Act of 1985. The PEC proposal, in his view, will result in more equity among fluid milk plants.

On cross-examination the PEC witness stated that this organization is not saying that the cost of transportation is any cheaper today than it was in 1977. He said that milk is not being moved into the central zone on a routine basis from outside this zone. The plants located in the minus 7-cent zone, he said, would have a fairly local procurement area and they do not utilize all the milk produced in the counties that would make up the minus 7-cent zone. Furthermore, he said, some of the milk produced in this area will move either to a fluid milk plant in the central zone or to the minus 5-cent zone or it may move to the MMPA balancing plant at Ovid, Michigan.

The PEC witness on cross-examination testified that the population west of Lansing has grown whereas the population in the Detroit metropolitan area as well as in Flint, Bay City-Saginaw has declined because of their reduced employment associated with the auto industry.

On cross-examination, the spokesman for the PEC indicated that a manufacturing plant under construction at Allendale (Ottawa County) that will be supplied by MMPA, would become operational late in 1989. He said that MMPA will still have a commitment to supply the local fluid milk plants.

The PEC proposal was supported at the hearing by a witness for the Borden Company that operates a fluid milk plant located at Madison Heights, Michigan. This witness said that the proposal would not affect their costs and that none of their competitors would have their costs lowered.

A witness for Kraft, Inc. (Kraft), testified in opposition to the proposal. He said that Kraft operates supply plants at Pinconning and Clare, Michigan. The Clare plant, he said, now is subject to a minus 11-cent location adjustment and the Pinconning plant currently is subject to a minus 7-cent location adjustment.

The Kraft witness said that the two supply plants qualify as fully regulated supply plants because of the unit system of pooling administered by MMPA. The Pinconning plant, he said, receives milk from nonmember producers, one-third of whom are located in Huron, Tuscola and Sanilac Counties, Michigan, and the remaining two-thirds of the producers are located in counties north of Pinconning. He said the milk supply for the Clare plant comes from the central part of the state from Traverse City to Lansing.

Kraft's witness expressed the view that the current pricing structure of Order 40 reflects the sound principles applied throughout the milk order system such as: (1) the location price for milk should be reduced in direct proportion to the distance from the primary market, (2) the price of milk in major milk production areas should be lower than the price in principal consuming areas and, (3) similar prices should apply to similarly situated handlers.

The witness for Kraft testified that the proposal as it relates to their Pinconning plant would put their plant at a competitive disadvantage. This, he says, is because the producer pay price in Sanilac County would increase by 7 cents in a county where a competing supply plant is located at Marlette that would have a zero location adjustment.

Kraft's witness said that the proposal would do nothing to encourage the movement of milk from Sanilac or Huron Counties to the metropolitan Detroit area. He said that the proposal would discourage such shipments since the price difference between the "thumb" area and the Detroit metropolitan area would be reduced from 17 cents (10 cent direct-delivery differential plus 7 cents) to 10 cents.

The Kraft witness testified that the proposal would eliminate the incentive to move milk from the "thumb" area to distributing plants located at Port Huron, Flint, Saginaw and Bay City. This, he says, is because a zero price difference is proposed between the production area and these plants in contrast to a 7-cent incentive that now exists.

Kraft's witness said that the proposal would provide the MMPA butter-powder plant at Ovid, Michigan, with an ability (7 cents) to attract milk supplies located in the "thumb" area away from Kraft's Pinconning plant. He said that the proposal will make Kraft the only purchaser of milk in the "thumb" area with a minus location adjustment and that this additional expense of 7 cents will cost Kraft approximately $33,000 per year.

The witness for Kraft expressed the view that the proposal will be disruptive in the western part of the State

between manufacturing plants. He said that in Ottawa County the blend price would increase 6 cents (minus 11 to minus 5 cents) and the impact will apply to a cheese plant being built by Leprino Foods, (Leprino) at Allendale, Michigan (Ottawa County). The plant when completed, he said, will have a capacity to manufacture two- to two-and-a-half million pounds of milk per day and that this price increase of 6 cents on this volume of milk will reduce the pool about $500,000 per year. Furthermore, he said, the blend price at Allendale would be 2 cents higher than the blend price at Clare. At the present time, he said, the two locations are priced the same. He said that the two cents on the expected volume at Allendale would result in a $144,000 procurement advantage per year to Leprino.

Kraft's witness said that the proposal is contrary to the historical policy and recent decisions by the Secretary. In his view, the proposal does less to reflect the cost of transporting milk from the production areas to the consuming areas than do the current provisions of the order. He said that the Secretary should be consistent and not adopt the proposal because it would increase prices in the State's major production areas in order to provide a competitive advantage for one manufacturing plant.

At the hearing and in their brief, Lansing Dairy, located at Lansing, Michigan, opposed the PEC proposal. Their spokesman said that transportation costs have gone up in the six counties surrounding Detroit. He said that the proposal would cost their plant about half a cent per gallon and, on their volume of sales, about $1,500-$1,600 per week. He said that the proposal will help MMPA's relationship with the Leprino cheese plant at Remus, Michigan, and with the Leprino plant under construction at Allendale.

Frigo Cheese Corporation (Frigo) opposed the proposal. The Frigo witness testified that Frigo operates three supply plants pooled on Order 40 that are located at Carney, Michigan, and at Lena and Wyocena, Wisconsin. He said that Frigo has been associated with Order 40 for over 18 years through the

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unit pooling provisions administered by Dean Foods Company (Dean). The witness said that the PEC proposal would be disruptive to producers located in the Upper Peninsula and, therefore, Frigo was proposing a modification to the proposals.

The spokesman for Frigo proposed adding to the PEC proposals two more zones applicable to the Upper Peninsula with fixed location adjustments. He would add a Zone 4 with a minus 20-cent location adjustment and a Zone 5 with a minus 40-cent location adjustment. He said that Zone 4 would include the area outside of the marketing area but located in the Upper Peninsula that contains the counties of Alger, Baraga, Chippewa, Houghton, Keweenaw, Luce, Mackinac, Marquette and Schoolcraft. Zone 5, he said, would include the area outside the marketing area but located in the Upper Peninsula and would include the counties of Delta, Dickinson, Gogebic, Iron, Menominee and Ontonagon. Although offered as a modification of proposal No. 1, this proposal must be considered as more directly related to the PEC proposal to change the rate for computing location adjustments at plants outside the specified zones.

As indicated previously, the PEC proposed adding Macomb County to the area now subject to the direct-delivery differential. The proposed direct-delivery

differential rate would be 10 cents and would apply to all of Wayne, Oakland and Macomb Counties.

The PEC witness testified that the proposal would increase the cost to one fluid milk plant located in Novi Township of Oakland County. He said that approximately 20 miles separates the Novi plant that is subject to a plus 4-cent direct-delivery differential from three large fluid milk plants located in the plus 10-cent area and that this minor difference in distance does not justify a 6-cent difference in the location value of producer milk.

The spokesman for the PEC said that the plus 10-cent direct-delivery differential is needed to induce needed milk deliveries to the present plants or any future plant that may be built in this three-county area. This expansion, he says, parallels the extension of the residential Detroit metropolitan area since the order was amended in 1977.

Proponent's witness testified that rapid urban development in Oakland and Macomb Counties has virtually eliminated milk production in these counties. He noted that within a 60-mile radius of the Detroit area, in the counties adjacent to the tri-county area, milk production in December 1977 was 40 million pounds and that by December 1987 milk production within the same radius had decreased to about 35 millon pounds.

The PEC witness expressed the view that the direct-delivery differentials for this market have, over time, helped to provide milk supplies for milk plants located in the Detroit metropolitan area. He said that the additional 10 cents still fairly reflects the additional hauling cost paid on the majority of the milk moving to the Detroit

area versus the cost of moving milk to other local markets in the central zone.

The changes in the plant location adjustment zones proposed by the PEC should be adopted. These changes will produce a flatter Class I and uniform price structure within the marketing area that will better reflect the need to move less milk under current market conditions. Instead of two direct-delivery zones (plus four cents and plus ten cents) and seven location adjustment zones (ranging from no adjustment to a minus 17 cents adjustment), there should be one direct-delivery zone (plus ten cents) and three location adjustment zones (ranging from zero to minus seven cents).

The current zone pricing structure has been in place since 1977. Since then, numerous changes have occurred in the market that warrant fewer zones and less incentive to move milk toward the Detroit metropolitan area from the outlying production areas. These changes include population shifts, plant closings, and increased milk production.

The metropolitan Detroit area (principally Macomb, Oakland and Wayne Counties) is still the market's largest single population center. However, population in Wayne County declined more than 12 percent (300,000) from July 1976 to July 1986.[1]

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[1] Official notice is taken of the following sources of population data:

Press Release, CB 87-116, released July 24, 1987, by the Bureau of the Census, United States Department of Commerce.

Estimates of the Population of Michigan Counties and Metropolitan areas: July 1, 1976 (Revised) and 1977 (Provisional), Current Population Reports, Series P-26, No. 77-22, Issued September 1978 by the Bureau of the Census, United States Department of Commerce.

Provisional Estimates of the Population of Counties: July 1, 1986, Current Population Reports, Series P-26, No. 86-A, Issued August 1987 by the Bureau of the Census, United States Department of Commerce.

Although the population in Oakland and Macomb Counties increased during this period, the three-county area combined had 5.5 percent fewer inhabitants as of July 1986 than there were in July 1976. These three counties, which make up the proposed direct delivery differential zone, contained 46.8 percent of the marketing area population in July 1976, but only 44.0 percent in July 1986. The net decline for the three counties combined was more than 225,000 persons.

Data in exhibits show that annual Class I packaged milk dispositions from plants located in the direct-delivery differential zone (Wayne and Oakland Counties -- there are no milk plants in Macomb County) declined by 35.5 percent, from 1.255 billion pounds in 1977 to 810.3 million pounds in 1987. The difference, 455.2 million pounds, represents the annual average milk production of nearly 500 Michigan dairy farms in 1987, based on daily deliveries per farm of 2,500 pounds of milk. This

number simply serves to emphasize how much less Class I milk is currently used by plants in this zone than was needed ten years ago.

Milk production in the direct-delivery differential zone dropped by over 44 percent (from 4.8 million to 2.6 million pounds) between December 1977 and December 1987. However, within this zone, two large distributing plants have closed. To the extent that there is a need for milk at plants in the direct-delivery differential zone, the 10-cent differential, which is paid directly to producers and therefore is not pooled, is viewed by the supplying cooperatives as adequate to cover the additional cost of delivering milk to plants located in the three-county area. No one opposed expanding the direct-delivery differential zone to include all three counties and fixing a uniform rate of 10-cents per hundredweight for the direct-delivery differential. The direct-delivery differential has no impact on the pooled value of milk and thus no impact on the uniform price.

The balance of the proposed "zero" zone consists of all or a portion of 18 counties, covering approximately the southeastern one-third of the lower portion of the State of Michigan. In this larger area, population increased slightly (2.2 percent) between 1976 and 1986, while milk production increased 0.8 percent (1.26 million pounds) over the same period of time. This zone includes several population centers, including Flint, Lansing, Saginaw and Bay City, all of which are Metropolitan Statistical Areas (MSA's) as defined by the Bureau of the Census. Two of these MSA'S, Flint and Lansing, experienced population declines from 1976 to 1986, while the Saginaw and Bay City area population increased by over 16 percent, or more than 57,000 persons.

The population of the entire zero zone (which includes the direct-delivery differential zone) overall dropped by

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2.75 percent (175,200) from 1976 to 1986. Three supply plants and four distributing plants (including the two mentioned earlier in the direct-delivery differential zone) have closed in the zero zone since 1977. Slightly more than 70 percent of the market's population resides in these 21 counties. Plants located in this zone received two-thirds of the market's producer milk in December 1987 and accounted for 68 percent of the market's Class I milk.

Milk produced in the 21-county zero zone and pooled during December 1987 amounted to 158.9 million pounds. Class I sales by plants located in these counties totaled 119.7 million pounds for the same month. Thus, Class I use amounted to about 75 percent of the milk that was produced in these counties. Overall, it appears that there is a good balance between production and Class I use in this area. Nevertheless, there may be some need to attract limited amounts of additional milk to plants in this zone from other zones. To this extent the proposed five cents Class I price difference between Zones 1 and 2, and the seven cents difference between Zones 1 and 3, should be adequate to attract such supplies.

Zone 2, the minus five cents zone, had 21 percent of the marketing area population in July 1986, an increase of 8.5 percent (146,400) from 10 years earlier. Milk production in this area in December 1987 was up about four percent from 10 years earlier. December 1987 pooled milk produced in counties in this zone totaled 102 million pounds, while plants in the zone had Class I uses

of about 35 million pounds. Thus, there appears to be plenty of milk to serve this area. The two-cent Class I price difference between Zones 2 and 3 would cover only movements of milk from a short distance into Zone 3.

There are four MSA's in Zone 2. They include Battle Creek, Grand Rapids, Kalamazoo, and Muskegon. Of these, only the Grand Rapids MSA experienced growth from 1976 to 1986. The others declined from 0.1 percent (Muskegon) to 25 percent (Battle Creek). Many of the counties in this proposed zone currently are in a minus nine-cent or minus 11-cent zone. Such lower prices may encourage milk to move to higher-priced areas where it is not now needed.

Another consideration of the proposed five-cent lower Class I price in this zone is that it will improve price alignment with the northern tier of,counties in the Indiana Federal milk order. The Class I price differential in the no-adjustment zone of the Indiana order is $2.00 per hundredweight. However, the four Michigan counties that are in the Indiana Federal order marketing area, along with other counties in northern Indiana, are in a minus 30-cent location adjustment zone. Under the current Southern Michigan order, the zero adjustment Class I differential is $1.75 per hundredweight, with location adjustments of minus nine cents and minus 11 cents applicable to plants in Michigan counties along the Michigan-Indiana border. This arrangement results in misalignment of Class I prices between the two orders. Thus, a minus five-cent zone in southwestern Michigan will provide Class I price alignment in the four Michigan counties that are part of the Indiana marketing area.

The third zone proposed, with a minus seven-cent adjustment, is much more a rural area than are the other

two zones. On a percentage basis, the population increase in this zone was the largest, showing an 11 percent (75,000) gain from 1976 to 1986. However, the 1986 population of this zone is the smallest, comprising only 8.4 percent of the marketing area's total population. This zone also appears to be self-sufficient with respect to milk supply and demand. In December 1987, pooled milk produced in this zone amounted to 86.7 million pounds. Class I use by plants in this zone and outside the marketing area amounted to 20.4 million pounds.

The counties that comprise this minus seven-cent zone currently are in one of five different zones ranging from minus seven cents to minus 17 cents. Only two distributing plants are located in this zone, one at Cheboygan, which is near the northern tip of the lower peninsula, and one at Evart, which is more nearly in the center of the lower peninsula. Currently, the Cheboygan plant is in the minus 17-cent zone, while the Evart plant is in the minus 11-cent zone.

The record does not reveal the sizes of the two distributing plants in the proposed Zone 3, but an exhibit requested by Kraft, Inc., and prepared by the market administrator indicates that total Class I use by Southern Michigan handlers in all the territory outside proposed Zones 1 and 2 amounted to 20.5 million pounds in December 1987. Thus it is safe to assume that each of the two plants in Zone 3 had less Class I milk than the 20.5 million pounds. It is noted that in December 1987, pooled milk production in the Michigan Counties of Newaygo, Mecosta, Isabella, Gladwin, Clare, Osceola, and Missaukee totaled more than 50 million pounds. Since the plant at Evart is in Osceola County, and the counties just noted are either adjacent to it or nearby,

there seems to be no need for a higher price at Evart to attract milk from the Cheboygan area.

The justification for fewer pricing zones is further reinforced by looking at the marketing situation overall. From 1976 to 1986, the population of the lower peninsula grew by only .5 percent, or about 46,000 persons. While the population remained static in size, major changes were going on as population shifts occurred. Some of these have already been noted. At the same time, total Class I packaged milk sales by Southern Michigan order pool handlers actually declined, from about 2,218 million pounds in 1977 to 1,976 million pounds in 1987, a 10.9 percent drop. However, milk production pooled under the order increased by nearly 10.5 percent over the same period. Thus, the percent of available milk used for Class I purposes declined from 53.9 percent in 1977 to 43.4 percent in 1987.

Moreover, Class I sales from plants in the Detroit metropolitan area have declined while sales from plants in more outlying areas have increased. These changes call for eliminating some of the highly structured zone pricing that has been operational since 1977. It is no longer needed.

The opposition by Kraft, Inc. and Lansing Dairy, Inc. has been noted. Lansing Dairy objected because its costs would be increased due to the higher applicable Class I price, which would have a negative economic impact on their operation. Lansing also expressed a view that it was indirectly being asked to subsidize the economic relationship between the cooperative and the Leprino Cheese operations.

Under the changed zone structure, Lansing Dairy will be affected two ways. First, the Class I price under the order at Lansing will be five cents higher than it now is. However, Lansing Dairy is one of four distributing plants in what is now a minus five-cent zone that will be in the new zero zone. Two of the other plants are in Lansing and one is in Jackson. Thus, plants in the same general area will be treated alike and pricing equity among these competing handlers will continue.

Second, Lansing Dairy's witness indicated that the handler procures some milk from independent producers north of Lansing, as far away as McBain in Missaukee County. Currently, the zone price difference between McBain and Lansing is six cents. Under the new structure, it will be seven cents. Thus, there will be greater recovery of hauling costs under the order for the handler's independent producers. This may work to the handler's advantage in procuring milk supplies.

Two proprietary handler supply plants would be similarly affected by the

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changes. The Kraft plant at Clare, which is now in a minus 11-cent zone, would be in a minus seven-cent zone. Diehl, Inc., which operates a supply plant in Charlotte, Michigan (Eaton County), now is in a minus seven-cent zone, but will be in a minus five-cent zone. Aside from MMPA's plant in Adrian, the only other supply plant in lower Michigan that will not have a higher blend price at its location is the Kraft plant at Pinconning, Michigan, which is now and will continue to be in a minus seven-cent zone.

Kraft objected to higher blend prices at the MMPA plant at Ovid and the NFO plant at Marlette since its Pinconning plant competes for part of its milk supplies in a common production area. All three plants are now in the same pricing zone. Kraft's principal objection is that it believes it will have to pay its producers the higher blend price that would be applicable at the Marlette plant in order to compete with NFO for milk supplies. Kraft contends that it would have to absorb the price difference of 7 cents per hundredweight, which would amount to about $33,000 per year. If it does not do this, Kraft implies its producers will look for another buyer.

Kraft further argues (in its brief) that in 1977 it proposed higher prices at a manufacturing plant in Saginaw County and for the Kraft plant in Pinconning for essentially the same reasons that PEC now proposes higher prices at the Marlette and Ovid plants. However, Kraft's proposal was denied. The Kraft brief argues that a higher price (at any plant) cannot now be adopted for the same area without the expression of a reversal of past policy. Kraft, in its brief, asked that Official Notice be taken of the Deputy Assistant Secretary's Interim Final Decision, Docket No. AO-361-A24 et al., published in the Federal Register on July 8, 1986 (51 FR 24677). The requested document involved the issue of appropriate location adjustments in several orders, including Indiana, but not the Southern Michigan order. However, since the request does not indicate how Official Notice of that document would be useful in this proceeding, the request is denied.

In opposing Class I price increases in southwestern Michigan, Kraft points to the fact that the Class I differential at a Kalamazoo County distributing plant under the Indiana order would be $1.66. Kraft maintains

that PEC's proposals do not, as PEC claims, improve price alignment between the Southern Michigan and Indiana orders. Kraft's brief also maintains that the PEC's proposed increase in the blend prices in southwestern Michigan will tend to encourage milk supplies to remain at manufacturing plants such as the MMPA plant under construction at Allendale (Ottawa County), rather than being delivered to deficit Class I markets. Kraft claims that MMPA admittedly plans to serve the Allendale plant with milk now sold to out-of-area customers.

Kraft's point about alignment of prices between the Southern Michigan and Indiana orders in Kalamazoo County, Michigan, is correct. However, four Michigan counties (Berrien, Cass, St. Joseph, and Branch) and 14 northern Indiana counties are in the minus 30-cent zone of the Indiana order. At plant locations in the four Michigan counties in this pricing zone of the Indiana order, Class I prices would be aligned under PEC's proposal. Kraft's claim that the PEC proposals diminish price alignment is correct at some locations while the PEC's claim that their proposals improve price alignment with Indiana is true at other locations.

Kraft expressed a view that higher Class I prices at plant locations in the proposed base zone and the minus five-cent zone are not needed because the plants are located in major milk producing areas where milk production is more than ample. Kraft holds that such increases will send a signal to producers to increase production. Instead, Kraft's brief suggests that the base zone (no adjustment) price could be lowered since the PEC maintains that there is now less need than there was in prior years to attract milk to Zone 1. However, there were no proposals submitted nor any testimony offered in

support of any lowering of the Class I price. Moreover, the price changes are not of sufficient magnitude to have any measurable production response.

With regard to Kraft's concern that the PEC proposal would not result in a higher blend price at its Pinconning plant, the PEC witness indicated that the majority of the "thumb" milk supply is delivered to fluid milk plants in Flint, Port Huron, and Detroit. This certainly indicates that milk from the "thumb" area moves southward and therefore the zero adjustment zone should include the "thumb" counties. On the other hand, the record fails to establish that the Pinconning plant of Kraft has a particular association with the proposed new Zone 1 or that it now serves as a balancing plant for other plants that would be in the proposed new "no-adjustment" zone. While it is true that the plants at Ovid (MMTA), Marlette (NFO) and Pinconning (Kraft) have been in the same zone since at least 1977, there is no basis in the record to conclude that Pinconning should be included in the new no-adjustment zone along with the other two plants at Ovid and Marlette.

It also should be noted that Kraft's plant at Clare will be in the same pricing zone as MMPA's plant at Remus. Currently, the Remus plant is in the minus 9-cent zone while the Clare plant is in the minus 11-cent zone. In this case, Kraft's ability to compete for milk supplies should be improved.

Finally, the change from seven pricing zones to three pricing zones is not tied to the cost of moving milk. Transportation costs were the main consideration when the current zone structure was adopted in 1977. Given the changes that have occurred since then, the new pricing structure will reflect three basically self-sufficient

pricing zones with recognition that some limited movements of milk between zones may be needed. Also, these changed zones allow the cooperatives that operate market-balancing manufacturing facilities an opportunity to operate those plants without being unduly influenced by differences in location adjustments.

Exceptions to the recommended decision on this issue were filed by Kraft and Lansing Dairy. Kraft also asked that the hearing be reopened because of the closing of the Kraft plant at Clare, Michigan, and because of what they perceive as a change in the Department's policy on Class I pricing subsequent to the close of the hearing.

Kraft in its exceptions, has characterized the Secretary's decision to reduce the minus location adjustments in several zones as raising the minimum Class I price. Kraft cites the statutory language of Section 8c(18) of the Agricultural Marketing Agreement Act of 1937 (Act). In Kraft's view, the Act permits the Secretary to raise milk prices in a market or at a location when the current price is inadequate to attract "a sufficient quantity of pure and wholesome milk" to meet fluid needs. Section 8c(18), in their view, does not permit a minimum price increase where uncontroverted evidence establishes, and the Secretary finds, that the current supply is more than adequate to meet fluid needs.

The Class I differential, which is established at the base or "zero" zone, is $1.75, and would not be changed. Section 8c(18) is the authority for the Secretary to change the Class I differential if supply and demand warrants a change in order to increase or decrease milk production. The authority for the Secretary to provide for pricing zones (location adjustments) in an order is found in Section 8c(5)(A) of

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the Act. What this decision does is to reduce location adjustments at various locations inside the lower portion of Michigan, but outside the Detroit area.

Kraft, in support of its Motion to Reopen the Hearing, refers to three letters from the Administrator of the Agricultural Marketing Service to: (1) Kraft, dated June 7, 1988, (2) Friendship Dairies, Inc., dated June 7, 1988, and (3) Dean Foods, dated March 22, 1989. In Kraft's view, the denial of proposals by these three organizations (markets other than Southern Michigan) is inconsistent with our rationale in the Southern Michigan decision.

The letter to Kraft was a denial of their proposal to increase the Class I differential 15 cents in the New York-New Jersey market because of the supply-demand pricing standard contained in Section 8c(18) of the Act.

The letter to Friendship Dairies, Inc. denied two proposals that would have increased the Class I differential in the New York-New Jersey market. Again this denial was based on the supply-demand pricing standards contained in Section 8c(18) of the Act.

The letter to Dean denied proposals that would have decreased the Class I differential seven cents in the Rio Grande Valley order and would have changed the location adjustment applicable to plants located in southeastern New Mexico from a minus 15 cents to a plus 21 cents for a net increase of 29 cents at Clovis, New Mexico. This request was prompted by Dean and several other handlers to lessen perceived interhandler inequities in the costs of raw milk that resulted from a 96-cent increase in the Class I differential under the Texas order and no change

in the Rio Grande Valley Class I differential as mandated by the Food Security Act of 1985.

The Dean proposals were denied because they were inconsistent with the purpose of location adjustments since the proposals would have increased the price of milk in an area of surplus production and decreased the price of milk in an area that is slightly deficit in terms of local supplies.

The factual situation in the southwestern United States in March 1989, in terms of supply-demand for milk, was entirely different than marketing conditions in the Southern Michigan market at the time of the hearing (May 1988). Therefore, there is no inconsistency on the part of the Department in denying the proposals to amend the Rio Grande Valley order and in adopting the proposed amendments to the Southern Michigan order. Kraft, it appears, is misinterpreting the two sections of the statute that have been cited earlier and has taken a very narrow view of the purpose of location adjustments. The primary purpose of location adjustments continues to be to provide an incentive to move milk from the production area to the consumption center.

There is nothing improper about increasing or decreasing the location adjustment in a market to reflect changes in the relationship between production areas and consumption areas. As clearly stated in the recommended decision, there have been significant changes in the Southern Michigan market since 1977 to justify the adoption of the proposed amendments.

Kraft, in its motion to reopen the hearing, states that it has closed its Clare, Michigan, plant since the hearing was held and that this has decreased the manufacturing

capacity in the market. In Kraft's view, the closing of the Clare plant justifies reopening the hearing.

Kraft's request to reopen the hearing also relies on statements in briefs and exceptions filed by other producers and handlers to the effect that they would withdraw their milk from the Southern Michigan pool if certain proposed location adjustments were adopted at plants located outside the marketing area.

In response, we must conclude that Kraft's arguments are not persuasive as to any need to reopen the hearing. As to any loss of manufacturing capacity, we find no reason to believe that there will be any significant impact on the market due to such reduced capacity. Moreover, the record reveals that a new manufacturing plant is under construction, although it is at a different location. Since neither of the Kraft plants ship milk to distributing plants, we foresee no impact upon availability of milk for Class I use due to Kraft's closing its plant at Clare.

As to whether other parties shift milk to another order, such action, if it occurs, would not have a negative impact upon blend prices to producers in the lower portion of Michigan. If the result of such a shift would be higher blend prices to producers in lower Michigan, that would not compel a reopening of the hearing, even if the PEC did not intend that the effect of its proposals would be to increase returns to producers. It would not be surprising that adoption of a more realistic location adjustment applicable to distant milk supplies would cause handlers to evaluate whether those distant supplies should continue to be associated with the Southern Michigan order.

For the foregoing reason, the exceptions filed by Kraft and the Motion to Reopen the Hearing are denied.

Lansing Dairy also took exception to the recommended decision because its costs for bulk milk would be five cents higher since the plant would be in the base zone rather than in the minus five-cent zone. In its exceptions, Lansing states that over 30 percent of its finished products are marketed in the Detroit area and that therefore, its major competitors are not in the same area as its plant.

In Lansing's view, the Secretary should consider a handler's cost of hauling packaged milk to the major sales area where they compete in arriving at the appropriate location adjustment. However, it is not the purpose of location adjustments to reflect the costs of moving packaged milk from one location to another. There is nothing in the exception that persuades us to reconsider this issue. Therefore, the exceptions filed by Lansing are denied.

2. *The location adjustment rates applicable to plants located outside location adjustment zones.* The order should be amended to specify 2.25 cents per hundredweight per 10 miles as the rate to be used for computing Class I and uniform price differentials at plants located outside the defined location adjustment zones.

As indicated previously, the PEC proposed changing the location adjustment rate on Class I milk and the uniform price applicable to plants located outside the marketing area. The PEC proposed changing the present rate from 1 cent to 2.25 cents per ten miles or fraction thereof.

The PEC witness testified that the present one-cent rate does not result in very close alignment of either the Order 40 Class I price or the Order 40 uniform price as it relates to prices in other markets in the Upper Midwest.

Proponent's witness said that the Chicago order's Class I differential at Green Bay, Wisconsin, for example, is $1.12; whereas, the Order 40 Class I differential at this location using the present one-cent rate would be $1.40.

The spokesman for the PEC said that the difference in the blend price for a producer who is pooled at an Order 40 plant versus an Order 30 plant is even more dramatic. For example, he stated that for 1987, the Order 30 uniform price zoned out to Oconto, Wisconsin, averaged $11.44. The 1987 uniform price for milk pooled by an Order 40 plant also located in Oconto County, he said, averaged $11.71. The Frigo Cheese

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Company plant at Lena, Wisconsin, is in Oconto County.

The proponent's witness said that other examples of blend price differences could be demonstrated and that this degree of price difference creates disorderly market conditions. He said that this much of a difference in price creates an incentive for distant milk supplies to attempt to become pooled in a market with a higher Class I utilization while the supplier has no desire to supply the fluid market that is generating the higher blend price. Such activities, he said, dilute the returns from the Class I market for other producers who are actively involved in supplying the Class I and Class II processors.

The PEC spokesman said that milk from producers located in 16 Wisconsin counties was pooled as producer receipts on Order 40 for one or more months during 1987. In December 1977, he said, 10.6 million pounds of Wisconsin milk was pooled on Order 40 and for December 1987, 16.4 million pounds of Wisconsin milk was pooled on this order. The witness said that the PEC is concerned that this trend will escalate.

Proponent's witness said that in 1987 the producer delivery provisions and the diversion limitation provisions were relaxed. These changes, he said, were necessary to avoid uneconomic movements of milk but they also made it easier for distant producers to pool milk on Order 40 and divert that milk to nonpool plants. The witness said that under the current provisions, during the months of September through February each Order 40 producer is required to deliver only one day's production to a pool plant and that for the months of March through August, 100 percent of a producer's milk may be diverted to a nonpool plant.

The PEC witness testified that increasing the mileage rate as proposed will minimize the economic advantage that may be realized by such activities and therefore prevent the dilution of the uniform price. The mileage computation, he said, would be determined by the market administrator using the shortest highway distance between such a plant and the nearest point in the Southern Michigan marketing area.

On cross-examination, the proponent's witness testified that the PEC, in arriving at their proposed rate of 2.25 cents, considered the fact that within the State of Michigan, MMPA can haul milk at less cost than outside the State. He said that the State permits hauling tandem

units with a payload of 100,000 pounds in the Upper Peninsula. The proposed rate, he says, covers the cost of transporting milk within the State of Michigan but not outside the State.

At the hearing a witness for Chicagoland Dairy Sales, Inc. (CDS), testified in support of the PEC proposal.

The CDS witness said that this organization is comprised of four cooperative associations, namely, Alto Cooperative Creamery, Lake-to-Lake Dairy Cooperative (division of Land O'Lakes, Inc.), Outagamie Producers Cooperative and Wisconsin Dairies Cooperative. This organization, he said, has 12 reserve supply plants pooled on Order 30.

The CDS spokesman said that their organization is experiencing problems meeting Order 40's producer pay prices in the common procurement areas of Michigan and Wisconsin. He said that the higher pay prices result from the higher Class I utilization in the Southern Michigan market relative to the Chicago Regional market.

The witness said that there is a common overlapping procurement area in the State of Wisconsin and in Menominee County in Michigan. He said that when comparing May 1977 with May 1987, the amount of Wisconsin milk procured by Order 40 plants increased by 4.4 percent and for December 1987 the increase was 54 percent.

The spokesman for CDS also testified that the Order 40 uniform price for January 1988 was $11.98 at the zero zone and for Chicago the zero zone blend price was $11.47, or 51 cents lower. He said that the adjusted uniform price at Wyocena, Wisconsin (where a Frigo

plant is located), would be $11.64 ($11.98 minus a 34-cent location adjustment) for Order 40 and that under the Chicago order the uniform price at the same location (Zone 9) would be $11.26, or 38 cents less. The witness said that this pricing advantage enjoyed by plants pooled on Order 40 is due to the low location adjustment rate contained in that order. He said that Order 30 uses a location adjustment rate of 1.6 cents per 10 miles.

The CDS witness said that for the years of 1985 through 1987, the Order 40 uniform price averaged 21, 17 and 25 cents higher, respectively, than the Order 30 price at Wyocena. For 1988, he said, the spread for the months of January through April was 38, 41, 36 and 30 cents, respectively.

At Lena, Wisconsin (where another Frigo plant is located), he said, for the years of 1985 through 1987, the Order 40 uniform price averaged 26, 22 and 30 cents higher, respectively, than the Order 30 price at that same location. For 1988, he said, the spread for the months of January through April was 43, 46, 41 and 35 cents, respectively.

The CDS spokesman said that for the years of 1985 through 1987, the Order 40 uniform price averaged 35, 31 and 39 cents higher, respectively, than the Order 30 price at Carney, Michigan (the location of a third Frigo plant). For 1988, he said, the spread for the months of January through April was 52, 55, 50 and 44 cents, respectively.

The Frigo witness presented testimony to modify the PEC proposal. He said that the location adjustment rates for Order 33 (Ohio Valley) and Order 36 (Eastern Ohio-Western Pennsylvania) are 1.5 cents per 10 miles, for

Order 30 it is 1.53 cents, and 2.0 cents for Order 49 (Indiana). The witness said that the location adjustment rate for Order 40 should be somewhere between 1.5 and 2.0 cents per ten miles. He said that Frigo preferred a 1.5-cent rate. Furthermore, he said, § 1040.52(a)(2) of the order should be changed by deleting the language that reads "the nearest point in such territory" to read "the state line."

The Frigo spokesman said that the milk supply in the Upper Peninsula is closely aligned with Order 40 either through the efforts of MMPA or Frigo. He said that the PEC proposals would lower returns to dairy farmers located in the Upper Peninsula and also limit the economic viability of their Carney plant. In his opinion, there are no realistic alternatives for the Carney plant should it become unprofitable under Order 40. He said that reserve plant status under Order 30 is not possible.

On cross-examination he said that using a 1.5-cent location adjustment rate, as Frigo proposed, would produce minus location adjustments of 40 cents at Carney, 49 cents at Lena and 39.5 cents at Wyocena. He said that the current minus location adjustments at these same locations are 35, 41 and 34 cents, respectively. This would mean blend price decreases of 5,8 and 5.5 cents, respectively.

On cross-examination, he said that about three percent of their total milk supply moves to an Order 40 distributing plant. He said that very little milk moves from their Lena plant to Liberty Dairy, a distributing plant located at Evart, Michigan (Osceola County) and owned by Dean. The witness said that the unit pooling provisions do not require Frigo to ship any milk from any particular plant. He said that milk from their Wyocena

plant is moved the 320 miles around the south side of Lake Michigan to Liberty Dairy at a cost of $1.60 per hundredweight. From the Carney plant, he said, the milk moves north around

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Lake Michigan and that they pay various rates for hauling.

The Frigo modification was supported at the hearing by Dean. A witness for Dean testified that their distributing plant at Evart acquires, each month, up to 10 percent of their milk supply from Frigo. He said that the majority of their milk supply comes from the Upper Peninsula. The Dean witness testified that if the location adjustment for the MMPA supply plant at Sault Ste. Marie is 22 cents then the Frigo plant at Carney should have a 27-cent location adjustment.

The Dean spokesman expressed the view that after MMPA and Leprino build their new cheese plant at Allendale that he would have some reservation about milk supplies being made available for distributing plants. He said that if you look at Frigo from the standpoint of being a cheese operation and compare it to other cheese operations in the state, then you would have to conclude that Frigo is supplying more of their milk to the fluid market than any of the other cheese operations.

Farmers Union Milk Marketing Cooperative (FUMMC) also presented testimony to modify the PEC proposal. Their witness said that the FUMMC represents approximately 238 producers shipping to three supply plants pooled on Order 40 (Frigo plants). He said that the PEC proposal would adversely affect a group of Wisconsin and Michigan Upper Peninsula producers who

have been associated with Order 40 for 20 years. The proposal, he said, would result in the shifting of about 30 million pounds of milk from the Order 40 pool to the Order 30 pool, thereby reducing the Order 30 blend price which is already lower than the Order 40 blend price.

The FUMMC witness said that they want the PEC proposal to coincide with neighboring markets and that they prefer the Order 30 location adjustment rate of 1.53 cents. He said that the location adjustment rate should be calculated from the Michigan State line and that the present rate of one cent represents the cost of moving milk.

Manitowoc Milk Producers Cooperative (Manitowoc) also supported a modification of the PEC proposal. Their witness said that their organization represents approximately 2,500 members shipping milk to Orders 30, 40, 68 (Upper Midwest) and Order 79 (Iowa). He said that about 130 of their members are shipping milk to the Frigo plants located at Carney and Lena. The Manitowoc witness suggested a location adjustment rate of 1.5 cents per 10 miles. This rate, he said, would provide uniformity and equity among producers as Order 40 relates to other orders.

The proposal to change the rate for computing location adjustments to Class I and uniform prices at locations outside the territory specified in the location adjustment zones should be adopted. The current location adjustment rate of 1 cent per hundredweight per 10 miles seriously overstates the value of milk to the Southern Michigan pool at locations considerably distant from the central market.

Location adjustments to Class I and uniform prices at plants located outside the zones specified for lower Michigan, which includes the marketing area and other territory, are based on distance from the plant to the nearest point in such zoned territory. The location adjustment is computed by adding to the price differential applicable at such nearest point an amount computed by multiplying the number of 10-mile increments by one cent.

There are four supply plants pooled under the order at which such location adjustments are applicable. They are located at Sault Ste. Marie and Carney, both in the Upper Peninsula of Michigan, and at Lena and Wyocena, Wisconsin. The current location adjustments at those plants are: Sault Ste. Marie, -23 cents; Carney, -35 cents; Lena, -41 cents; and Wyocena, -34 cents.

The nearest point in the zoned territory for the plants in the Michigan Upper Peninsula and at Lena, Wisconsin, is Mackinaw City. For the Wyocena, Wisconsin, location, the mileage is computed from Grand Beach (Berrien County), Michigan. From the point of measurement, the mileages to the plants are as follows: Sault Ste. Marie, 51-60 miles; Carney, 171-180 miles; Lena, 231-240 miles; and Wyocena, 221-230 miles.

The current location adjustment rate is outdated. Its use results in Class I and uniform prices at the various locations that are too high relative to the prices of milk in the marketing area because the rate does not reflect the cost of hauling milk. The record indicates that it costs about 2.25 cents per hundredweight per 10 miles to move milk within Michigan, and 3.6 cents or more to move milk into Michigan from plants outside Michigan. These numbers are based on the testimony of the PEC witness,

who stated that the proposed 2.25-cent rate "—fairly well reflects the cost of transporting milk within Michigan." The witnesses for Frigo Cheese and Farmers Union Coop indicated rates of $1.60 per hundredweight for a 320-mile haul, and $1.60 to $1.80 per loaded mile, respectively. These rates vary from about 3.4 cents to 5 cents per ten miles per hundredweight, assuming a 47,000-pound load of milk for the per loaded mile figure. Thus, it is clear that a transportation rate of 1.0 cents per 10 miles per hundredweight is seriously inadequate to reflect hauling costs incurred under current conditions.

In exceptions to the recommended decision, Frigo maintained that the distance from Wyocena, Wisconsin, to Evart, Michigan is 443 miles, not 320. The 443-mile number is accepted as a more accurate number. Frigo's exception however, argues that based on the entire haul, the rate charged is only 1.8 cents per hundredweight per 10 miles, and thus concludes that the location adjustment rate should be 1.75 cents per 10 miles per hundredweight.

Location adjustments are based on the distance between plants. Likewise, the cost of hauling milk is for moving the milk from one location to another. The costs per hundredweight per 10 miles as indicated in the recommended decision stand as valid to reflect the hauling costs indicated by the representative for Frigo and by the representative for FUMMC.

Various proposed modifications of the PEC proposal should not be adopted. After a thorough analysis of the issue, it is concluded that the best fit of location adjustments outside the zoned area results from the PEC proposal.

The proposal by Frigo to extend the zoning concept to include two additional zones for the Michigan Upper Peninsula was not supported by testimony or other evidence other than an expression of concern for the well-being of producers in that area. In that regard, such a modification would provide a lesser location adjustment to producer blend prices at the Frigo supply plants than would the proposals of the PEC. Along with this modification Frigo proposed that location adjustments at plants outside Michigan be based on the distance from the plant to the State line as determined by the Market Administrator, and that the rate per hundredweight per 10 miles should be somewhere between 1.5 and 2.0 cents. Under this proposed modification, the location adjustment at Carney would be -40 cents, with adjustments at Lena and Wyocena of -52 cents and -51 cents, respectively.

The modifications suggested by FUMMC and Manitowoc would use 1.50-1.53 cents as the location adjustment rate. Additionally, FUMMC would prefer measuring distances to plants from the Michigan State line. The basis for these modifications was to improve uniformity of location adjustment rates among orders. It is noted that these modifications also would result in

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smaller negative location adjustments and, therefore, higher blend prices to producers at the Frigo plants.

The proposal by the PEC would produce location adjustments of -20.5 cents at Sault Ste. Marie and -47.5 cents, -61 cents, and -57 cents at the Carney, Lena, and Wyocena plants, respectively.

The record in this proceeding, as previously indicated, does not contain detailed hauling cost

information. But there is a basis for concluding that it costs more than 2.25 cents per hundredweight per 10 miles to move milk outside the State of Michigan. Therefore, there is no sound basis to consider further the alternative rates of 1.5 to 2.0 cents as suggested by several parties.

The value of milk at locations considerably distant from the central market must be related to the transportation costs that would be incurred in moving that milk to market. All the distributing plants that are fully regulated under the Southern Michigan order are located in the lower part of the State, mostly in the southern half of the State. Moreover, there is plenty of milk produced in this portion of the State to meet the market's needs. Since location adjustments at distant supply plants outside this area currently do not realistically reflect transportation costs, the blend prices applicable under the order at such locations overstate the value of the milk to the Class I market. Thus, the producers in the southern part of the State are subsidizing producer incomes in the Upper Peninsula and Wisconsin areas that supply milk to those supply plants. This situation would continue under the PEC proposals, but not to as great a degree as it now does.

The two supply plants in Michigan's Upper Peninsula are located in the marketing area defined under the Michigan Upper Peninsula order and the two Wisconsin supply plants are located in the Chicago Regional order marketing area. Ideally, location adjustment rates under the Southern Michigan order would provide Class I prices at the plant locations equal to the applicable Class I price at such locations for the order marketing area in which the plants are located. The plant at Wyocena, Wisconsin, has a Class I differential of $1.188 under the Chicago

Regional order. The PEC rate of 2.25 cents yields a Southern Michigan Class I differential at Wyocena of $1.75 minus 57 cents, or $1.18. Similarly, although not quite as close, the Chicago order Class I differential at Lena, Wisconsin is $1.073, whereas the 2.25 cents rate proposed under the Southern Michigan order would result in a Class I differential of $1.14.

Under the Michigan Upper Peninsula order, the Class I differential at Carney is $1.15, compared to the proposed $1.275 under the Southern Michigan order. At Sault Ste. Marie, the Class I differentials would not match up closely. The difference would be 19.5 cents. However, even with these differences Class I price alignment under the orders would be more nearly achieved using the 2.25-cent rate than with any of the proposed modifications. Thus, the best fit is provided using this rate.

There was some testimony on this issue concerning misalignment of blend prices at the Carney, Michigan, and Wisconsin supply plants. The location adjustment rate change will result in lower blend prices under the Southern Michigan order at these locations and thus in a closer alignment with blend prices under the Chicago order for the Wisconsin locations. However, it must be noted that the desire to achieve blend price alignment is not a sufficient basis for revising the location adjustment rate. Instead, the location adjustment rate should more nearly reflect the cost of transporting milk. Even if Class I prices are perfectly aligned, blend price differences may continue due to different levels of Class I use between two orders.

In addition to the exceptions filed by Frigo, exceptions also were filed by FUMMC and Dean. CDS

indicated by letter that they support the proposed amendments.

The Frigo exceptions, for the most part, are a reiteration of the testimony presented at the hearing and the arguments contained in a post-hearing brief. Their views regarding the appropriate location adjustment for their plant at Carney, Michigan were fully considered in the issuance of the recommended decision.

However, Frigo's exception suggests that the location adjustment rate is being changed for the purpose of improving blend price alignment between the Southern Michigan and Chicago orders. This is not the case. The only purpose for adopting the 2.25 cents per hundredweight per 10 miles rate is so that the value of milk at these distant locations will more nearly reflect the cost of moving milk to the market. For this reason, and other reasons stated earlier in this decision, the Frigo exceptions are denied.

The exceptions filed by FUMMC also constitute a reiteration of their testimony at the hearing and the arguments contained in their post-hearing brief. Their views regarding the appropriate location adjustments for plants located beyond the proposed pricing zones were fully considered in the issuance of the recommended decision, therefore, their exceptions are denied.

Dean, in its exceptions, indicates the volume of milk received by its Liberty Dairy plant for the month of January 1989 and the distance this milk moved from the farms to the plant. This information cannot be considered by the Secretary because it was not part of the record.

Dean's representative in his exceptions and in his testimony presented at the hearing expressed a concern about the price that Dean will have to pay for milk to supply the Liberty Dairy plant as a result of the agreement between Leprino Cheese and MMPA. Dean has also expressed the view that this decision will exacerbate their ability to acquire a supply of milk because Frigo may be forced to ship a substantial quantity of milk to the Chicago Regional order rather than deliver milk to Liberty Dairy. Dean has asked that the Secretary continue to have a minus 11-cent location adjustment at Liberty Dairy or to decrease the location adjustments by four cents that would not be applicable to Frigo at their three plant locations.

In essence, Dean is asking that order provisions ensure the ability to not have to rely too heavily on cooperatives in acquiring a supply of milk for the Evart plant. However, it is not the function of the order to assure any handler of a supply of milk from any particular source or exclusive of any source. Dean's arguments are not persuasive and the exceptions, therefore, are denied. The views expressed by Dean as to the appropriate location adjustments for plants located outside of the proposed zones were fully considered in the issuance of a recommended decision and, therefore, their exceptions are denied.

The proposed changes in the location pricing provisions (both the zoning and rate issues) will change the total value of pooled milk by a small amount. An exhibit introduced by the market administrator shows recomputed uniform prices for the zero adjustment zone for May 1987 through April 1988 as being only one cent per hundredweight lower for eight months and no change for the other four months. For example, had the

proposed changes been in place in December 1987, the value of Class I milk in the pool would have been, at most, about $40,000 higher. However, in a 379 million pound market, the impact of the $40,000 on the uniform price for

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the zero zone would have been about one cent per hundredweight.

There would be changes in the distribution of the location adjustment money among the market's producers. In general, producers in the western and northern part of the state will receive higher returns for their milk, while producers delivering their milk to plants located outside the marketing area will receive less for their milk. Not enough detailed information is available to be able to determine how much more or less will be paid to producers for delivering milk to plants in the specific zones. The amounts by which prices would change at the various locations have already been described.

3. *Changing the factor used in the computation of the butterfat differential.* ...

....

Rulings on Proposed Findings and Conclusions

Briefs and proposed findings and conclusions were filed on behalf of certain interested parties. These briefs, proposed findings and conclusions and the evidence in the record were considered in making the findings and conclusions set forth above. To the extent that the suggested findings and conclusions filed by interested parties are inconsistent with the findings and conclusions

set forth herein, the requests to make such findings or reach such conclusions are denied for the reasons previously stated in this decision.

General Findings

The findings and determinations hereinafter set forth supplement those that were made when the Southern Michigan order was first issued and when it was amended. The previous findings and determinations are hereby ratified and confirmed, except where they may conflict with those set forth herein.

(a) The tentative marketing agreement and the order, as hereby proposed to be amended, and all of the terms and conditions thereof, will tend to effectuate the declared policy of the Act;

(b) The parity prices of milk as determined pursuant to section 2 of the Act are not reasonable in view of the price of feeds, available supplies of feeds, and other economic conditions which affect market supply and demand for milk in the marketing area, and the minimum prices specified in the tentative marketing agreement and the order, as hereby proposed to be amended, are such prices as will reflect the aforesaid factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest; and

(c) The tentative marketing agreement and the order, as hereby proposed to be amended, will regulate the handling of milk in the same manner as, and will be applicable only to persons in the respective classes of industrial and commercial activity specified in, a marketing agreement upon which a hearing has been held.

Rulings on Exceptions

In arriving at the findings and conclusions, and the regulatory provisions of this decision, each of the exceptions received was carefully and fully considered in conjunction with the record evidence. To the extent that the findings and conclusions and the regulatory provisions of this decision are at variance with any of the exceptions, such exceptions are hereby overruled for the reasons previously stated in this decision.

Marketing Agreement and Order

Annexed hereto and made a part hereof are two documents, a Marketing Agreement regulating the handling of milk, and an Order amending the order regulating the handling of milk in the Southern Michigan marketing area, which have been decided upon as the detailed and appropriate means of effectuating the foregoing conclusions.

It is hereby ordered that this entire decision and the two documents annexed hereto be published in the Federal Register.

Determination of Producer Approval and Representative Period

January 1989 is hereby determined to be the representative period for the purpose of ascertaining whether the issuance of the order, as amended and as hereby proposed to be amended, regulating the handling of milk in the Southern Michigan marketing area is approved or favored by producers, as defined under the terms of the order (as amended and as hereby proposed to be amended), who during such representative period were

engaged in the production of milk for sale within the aforesaid marketing area.

List of Subjects In 7 CFR Part 1040

Milk marketing orders, Milk, Dairy products.

Signed at Washington, DC, on June 20, 1989.
Jo Ann R. Smith.
Assistant Secretary, Marketing and Inspection Services.

Order Amending the Order Regulating the Handling of Milk in the Southern Michigan Marketing Area

This order shall not become effective unless and until the requirements of § 900.14 of the rules of practice and procedure governing proceedings to formulate marketing agreements and marketing orders have been met.

Findings and Determinations

The findings and determinations hereinafter set forth supplement those that were made when the order was first issued and when it was amended. The previous findings and determinations are hereby ratified and confirmed,

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except where they may conflict with those set forth herein.

(a) Findings. A public hearing was held upon certain proposed amendments to the tentative marketing agreement and to the order regulating the handling of milk in the Southern Michigan marketing area. The hearing was held pursuant to the provisions of the

Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), and the applicable rules of practice and procedure (7 CFR Part 900).

Upon the basis of the evidence introduced at such hearing and the record thereof, it is found that:

(1) The said order as hereby amended, and all of the terms and conditions thereof, will tend to effectuate the declared policy of the Act;

(2) The parity prices of milk as determined pursuant to section 2 of the Act, are not reasonable in view of the price of feeds, available supplies of feeds, and other economic conditions which affect market supply and demand for milk in the said marketing area; and the minimum prices specified in the order as hereby amended are such prices as will reflect the aforesaid factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest; and

(3) The said order as hereby amended regulates the handling of milk in the same manner as, and is applicable only to persons in the respective classes of industrial or commercial activity specified in, a marketing agreement upon which a hearing has been held.

Order Relative to Handling

It is therefore ordered that on and after the effective date hereof, the handling of milk in the Southern Michigan marketing area shall be in conformity to and in compliance with the terms and conditions of the order, as amended, and as hereby amended, as follows:

The provisions of the proposed marketing agreement and order amending the order contained in the recommended decision issued by the Administrator on February 21, 1989, and published in the Federal Register on February 24, 1989 (54 FR 7938), shall be and are the terms and provisions of this order, amending the order, and are set forth in full herein.

PART 1040 - MILK IN THE SOUTHERN MICHIGAN MARKETING AREA

1. The authority citation for 7 CFR Part 1040 continues to read as follows:

Authority: Secs. 1-19, 48 Stat. 31, as amended; 7 U.S.C. 601-674.

§ 1040.52 [Amended]

2. In § 1040.52, revise paragraph (a)(1) to read as follows:

(a) * * *

(1) *Zone rates.* For a plant located within the following described territory, including the cities located therein, the applicable zone rates shall be as follows:

Michigan Counties

Zone I-No Adjustments

Clinton, Genesee, Gratiot, Hillsdale, Huron, Ingham, Jackson, Lapeer, Lenawee, Livingston, Macomb, Monroe, Oakland, Saginaw, Sanilac, St. Clair, Shiawassee, Tuscola, Washtenaw and Wayne.

Bay (except Gibson, Mount Forest, Pinconning, Garfield and Fraser Townships).

Zone II-5 cents

Allegan, Barry, Berrien, Branch, Calhoun, Cass, Eaton, Ionia, Kalamazoo, Kent, Montcalm, Muskegon, Ottawa, St. Joseph and Van Buren.

Zone III-7 cents

Bay (all townships excluded from Zone I), Alcona, Alpena, Antrim, Arenac, Benzie, Charlevoix, Cheboygan, Clare, Crawford, Emmet, Gladwin, Grand Traverse, Isabella, Iosco, Kalkaska, Lake, Leelanau, Manistee, Mason, Missaukee, Mecosta, Midland, Montmorency, Newago, Oceana, Ogemaw, Osceola, Oscoda, Otsego, Presque Isle, Roscommon and Wexford.

* * * * * *

3. Amend § 1040.52(a)(2) by changing "one cent" to "2.25 cents."

....

Marketing Agreement Regulating the Handling of Milk in the Southern Michigan Marketing Area

The parties hereto, in order to effectuate the declared policy of the Act, and in accordance with the rules of practice and procedure effective thereunder (7 CFR Part 900), desire to enter into this marketing agreement and do hereby agree that the provisions referred to in paragraph I hereof as augmented by the provisions specified in

paragraph H hereof, shall be and are the provisions of this marketing agreement as if set out in full herein.

I. The findings and determinations, order relative to handling, and the provisions of §§ 1040.1 to 1040.86, all inclusive, of the order regulating the handling of milk in the Southern Michigan marketing area (7 CFR PART 1040) which is annexed hereto; and

II. The following provisions:

§ 1040.87 Record of milk handled and authorization to correct typographical errors.

(a) Record of milk handled. The undersigned certifies that he handled during the month of January 1989, hundredweight of milk covered by this marketing agreement.

(b) Authorization to correct typographical errors. The undersigned hereby authorizes the Director, or Acting Director, Dairy Division, Agricultural Marketing Service, to correct any typographical errors which may have been made in this marketing agreement.

§ 1040.88 Effective date. This marketing agreement shall become effective upon the execution of a counterpart hereof by the Secretary in accordance with Section 900.14(a) of the aforesaid rules of practice and procedure.

In Witness Whereof, The contracting handlers, acting under the provisions of the Act, for the purposes and subject to the limitations herein contained and not otherwise, have hereunto set their respective hands and seals.

(Seal)
Attest_____
Date_____
_____
(Signature)
By_____
(Name) (Title)
_____
Address)

(FR Doc. 89-15024 Filed 6-23-89; 8:45 am)
Billing Code 3410-02-M

_____

Findings of Fact

1. Petitioner, Lansing Dairy, Inc., is a Michigan corporation which has its offices and principal place of business at 2224 West Willow Street, Lansing, Michigan 48901, and is a regulated "handler," as defined in § 1040.9 of the Federal Regulations Governing the Marketing of Milk in Southern Michigan ("Order 40") (7 C.F.R. § 1040.9 (1988)), by virtue of operating a pool distributing plant at Lansing (Ingham County), Michigan. Lansing Dairy is a wholly-owned subsidiary of Melody Foods, Inc., a privately-held Michigan corporation. (Petition, Answer)

2. Petitioner, Liberty Dairy Company, is a Michigan corporation which has its offices and principal place of business at 530 North River Street, Evart, Michigan 49631, and is a regulated "handler," as defined in § 1040.9 of the Federal Regulations Governing the Marketing of Milk in Southern Michigan, by virtue of operating a pool distributing plant at Evart (Osceola County), Michigan. Liberty is a

wholly-owned subsidiary of Dean Foods Co., a publicly-held corporation. (Petition, Answer)

3. Petitioner, Frigo Cheese Corporation, is a Wisconsin corporation with corporate offices at 108 Springhurst Drive, P.O. Box 19024, Green Bay, Wisconsin 54307-9024. Frigo is a "handler," as defined in § 1040.9 of the Federal Regulations Governing the Marketing of Milk in Southern Michigan, by virtue of operating a pool supply plant at Camey (Menominee County), Michigan. Frigo also operates a pool supply plant in Lena, Wisconsin, and operated a pool supply plant in Wyocena, Wisconsin, as of May 24, 1988. Frigo is a wholly-owned subsidiary of Unigate P.L.C., a publicly-held British corporation. (Petition, Answer)

4. On May 24, 1988, the Secretary[4] (Administrative Law Judge Dorothea A. Baker, presiding) conducted a formal rulemaking hearing at Romulus, Michigan, to consider amendments to Order 40 proposed by a group of dairy farmer cooperative associations, comprised of the Independent Cooperative Milk Producers Association, Michigan Milk Producers Association, National Farmers Organization, Inc., and Southern Milk Sales, Inc., organized as the Producers Equalization Committee (PEC). At that time, the four PEC members marketed approximately 87% of milk pooled on Order 40, but a much smaller percentage of Order 40 milk delivered to plants located in the Upper Peninsula and in Wisconsin. Order 40 milk pooled at plants in Wisconsin and the Upper Peninsula was marketed primarily through Farmers Union Milk Marketing Cooperative and the Manitowoc Milk Producers Cooperative (suppliers of Frigo), which were not

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[4] The term "Secretary" refers to the Secretary or any person delegated with authority to perform the function involved.

co-sponsors of the proposal. (Petition, Answer, PEC's Brief filed Mar. 1, 1990)

5. The PEC proposals at issue were to modify location adjustments to handler Class I and producer uniform prices under Order 40 in two respects. First, PEC proposed to reduce the minus location adjustments (thereby increasing prices paid by handlers) at plants in Zones II to VII in the Southern Peninsula, and to reduce the number of pricing zones to three. Second, PEC also proposed to increase the minus location adjustments in the Upper Peninsula and Wisconsin portions of the milkshed based on a rate of 2.25¢ per cwt. per 10 miles, rather than the preexisting rate of 1¢ per cwt. per 10 miles (thereby reducing prices paid by handlers). The reduction in uniform price to producers delivering milk to Frigo's cheese plants in Michigan and Wisconsin under this proposal ranged from 13¢ per cwt. to 23¢ per cwt. (Petition, Answer)

6. Petitioners appeared and presented testimony at the formal rulemaking bearing on May 24, 1988, and filed post-hearing briefs challenging the lawfulness and propriety of the PEC location adjustment proposals. (Petition, Answer)

7. On February 21, 1989, the Secretary issued a Recommended Decision, published at 54 Fed. Reg. 7938 (1989), which recommended adoption of the PEC location adjustment proposals. Each of the petitioners filed exceptions to the Recommended Decision. (Petition, Answer)

8. On June 20, 1989, the Secretary issued a Final Decision, published at 54 Fed. Reg. 26,768-80 (1989) (reprinted herein in its entirety, insofar as it relates to the location adjustments at issue here, *supra),* adopting the PEC location adjustment proposals and rejecting the exceptions submitted by petitioners and others. On July 6, 1989, the

Secretary issued a final rule amending the pricing regulations of Order 40, as requested by PEC, effective for milk marketed on and after September 1, 1989. This rule was published at 54 Fed. Reg. 29,327-28 (1989). Sections 1040.52(a)(1) and 1040.52(a)(2), as amended, are at issue herein. (Petition, Answer)

9. Under the terms of Order 40, petitioners have been and will be required to account to the producer-settlement fund for the higher Class I prices in the Southern Peninsula on October 13, 1989, and monthly thereafter, or will receive funds from the producer-settlement fund, reflecting the September price changes on October 14, 1989, and monthly thereafter; and producers, on October 15, 1989, will receive an increase in the uniform price for milk delivered to plants outside of (former) Zone I in the Southern Peninsula, and a substantially-reduced uniform price for September milk delivered to plants in the Upper Peninsula and Wisconsin. (Petition, Answer)

Conclusions

I. Burden of Proof and Scope of Review.

The fact that petitioners have the burden of proof in this proceeding, and that this is not a proceeding to "second guess" the Secretary's policy judgments, is set forth in many decisions, *e.g., In re Michaels Dairies, Inc.*, 33 Agric. Dec. 1633, 1701-02 (1974), *aff'd*, No. 22-75 (D.D.C. Aug. 21, 1975), *printed in* 34 Agric. Dec. 1319 (1975), *aff'd mem.*, 546 F.2d 1043 (D.C. Cir. 1976), which states:

> It is well settled that the burden of proof in an 8c(15)(A) review proceeding rests with the petitioner. Petitioner in this proceeding has the burden of proving that the challenged Order provisions and obligations

imposed upon it were "not in accordance with law" (7 U.S.C. 608c(15)(A)). *See Lewes Dairy, Inc. v. Freeman,* 401 F.2d 308, 316-317 (C.A. 3), certiorari denied, 394 U.S. 929; *Boonville Farms Cooperative, Inc. v. Freeman,* 358 F.2d 681, 682 (C.A. 2); *United States v. Mills,* 315 F.2d 828, 836, 838 (C.A. 4), certiorari denied, 374 U.S. 832, 375 U.S. 819; *Windham Creamery, Inc. v. Freeman,* 230 F. Supp. 632, 635-636 (D. N.J.), aff'd, 350 F.2d 978 (C.A. 3), certiorari denied, 382 U.S. 979; *Bailey Farm Dairy Co. v. Jones,* 61 F. Supp. 209, 217 (E.D. Mo.). affirmed, 157 F.2d 87 (C.A. 8), certiorari denied, 329 U.S. 788; *Wawa Dairy Farms v. Wickard,* 56 F. Supp. 67, 70 (E.D. Pa.), affirmed, 149 F.2d 860, 862-863 (C.A. 3); *In re Clyde Lisonbee,* 31 Agriculture Decisions 952, 961 (1972); *In re Fitchett Brothers, Inc.,* 31 Agriculture Decisions 1552, 1571 (1972).

The inquiry here does not encompass questions of policy, desirability, or the evaluation of the effectiveness of economic and marketing regulations issued pursuant to the Act. See *In re Independent Milk Producer-Distributors' Assoc.*, 20 Agriculture Decisions 1, 18 (1961); *In re Charles P. Mosby, Jr., d/b/a Cedar Grove Farms,* 16 Agriculture Decisions 1209, 1220 (1957), affirmed, Southern Dist. Miss., January 5, 1959. See, also, *Pacific States Co. v. White*, 296 U.S. 176, 182.

The responsibility for selecting the means of achieving the statutory policy and the relationship between the remedy selected and such policy are peculiarly matters of administrative competence. *American Power Co. v. S.E.C.*, 329 U.S. 90, 112; *Secretary of Agriculture v. Central Roig Co.*, 338 U.S. 604, 610-614.

Without a showing that the action of the Secretary was arbitrary, his action is presumed to be valid. *Benson v. Schofield,* 236 F.2d 719, 722 (C.A.D.C.), certiorari denied, 352 U.S. 976; *Reed v. Franke,* 297 F.2d 17, 25-26 (C.A. 4). Mere assertions of illegality are not sufficient to have an order provision or administrative decision declared illegal. *In re College Club Dairy, Inc.,* 15 Agriculture Decisions 367, 373 (1956).

There is a presumption of regularity with respect to the official acts of public officers and, "in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties." *United States v. Chemical Foundation,* 272 U.S. 1, 14-15. Accord: [*Panno v. United States*, 203 F.2d 504, 509 (9th Cir. 1953);] *Reines v. Woods,* 192 F.2d 83, 85 (Emerg. C.A.); *National Labor Relations Board v. Bibb Mfg. Co.*, 188 F.2d 825, 827 (C.A. 5); *Woods v. Tate*, 171 F.2d 511, 513 (C.A. 5); *Pasadena Research Laboratories v. United States,* 169 F.2d 375, 381 (C.A. 9), certiorari denied, 335 U.S. 853; *Laughlin v. Cummings*, 105 F.2d 71, 73 (C.A.D.C.). Specifically, administrative orders and regulations are presumed to be based on facts justifying the specific exercise of the delegated authority. *United States v. Rock Royal Co-op.*, 307 U.S. 533, 567-568 (a case under the Act involved herein); *Thompson v. Consolidated Gas Co.*, 300 U.S. 55, 69; *Pacific States Co. v. White,* 296 U.S. 176, 185-186.

The scope of review is set forth in § 10(e) of the Administrative Procedure Act as follows (5 U.S.C. § 706):

§ 706 Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant

questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

....

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute.

The "narrow" scope of review under the arbitrary and capricious standard (just quoted (5 U.S.C. § 706(2)(A)) is set forth in *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 416 (1971), as follows:

Section 706(2)(A) requires a finding that the actual choice made was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A) (1964 ed., Supp. V). To make this

> finding the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.... Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency.

The Court further stated in *Bowman Transp., Inc. v. Ark.-Best Freight System, Inc.*, 419 U.S. 281, 290 (1974):

> But we can discern in the Commission's opinion a rational basis for its treatment of the evidence, and the "arbitrary and capricious" test does not require more.

The "narrow" scope of review under § 706(2)(A), i.e., "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," and the fact that it "forbids the court's substituting its judgment for that of the agency," is explained in *Ethyl Corp. v. EPA,* 541 F.2d 1, 34-37 (D.C. Cir.) (en banc) (footnotes omitted), *cert. denied,* 426 U.S. 941 (1976), as follows:

> This standard of review is a highly deferential one. It presumes agency action to be valid.... Moreover, it forbids the court's substituting its judgment for that of the agency.... and requires affirmance if a rational basis exists for the agency's decision.73 . . .
>
> This is not to say, however, that we must rubber-stamp the agency decision as correct. To do so would render the appellate process a superfluous (although time-consuming) ritual. Rather, the reviewing court must assure itself that the agency decision was "based on a consideration of the relevant factors * * *."74 Moreover, it must engage in a "substantial

inquiry" into the facts, one that is "searching and careful." *Citizens to Preserve Overton Park v. Volpe, supra,* 401 U.S. at 415, 416, 91 S.Ct. at 823, 824, 28 L.Ed.2d at 152, 153. This is particularly true in highly technical cases such as this one.

> A court does not depart from its proper function when it undertakes a study of the record, hopefully perceptive, even as to the evidence on technical and specialized matters, for this enables the court to penetrate to the underlying decisions of the agency, to satisfy itself that the agency has exercised a reasoned discretion, with reasons that do not deviate from or ignore the ascertainable legislative intent.

Greater Boston Television Corp. v. FCC, 143 U.S. App. D.C. 383, 392, 444 F.2d 841, 850 (1970), *cert. denied,* 403 U.S. 923, 91 S.Ct. 2229, 2233, 29 L.Ed.2d 701 (1971)....

There is no inconsistency between the deferential standard of review and the requirement that the reviewing court involve itself in even the most complex evidentiary matters; rather, the two indicia of arbitrary and capricious review stand in careful balance. The close scrutiny of the evidence is intended to educate the court. It must understand enough about the problem confronting the agency to comprehend the meaning of the evidence relied upon and the evidence discarded; the questions addressed by the agency and those bypassed; the choices open to the agency and those made. The more technical the case, the more intensive must be the court's effort to understand the evidence, for without an appropriate understanding of the case before it the court cannot properly perform its appellate function. But that function must be performed with conscientious awareness of its limited nature. The

> enforced education into the intricacies of the problem before the agency is not designed to enable the court to become a superagency that can supplant the agency's expert decision-maker. To the contrary, the court must give due deference to the agency's ability to rely on its own developed expertise.... The immersion in the evidence is designed *solely* to enable the court to determine whether the agency decision was rational and based on consideration of the relevant factors.... It is settled that we must affirm decisions with which we disagree so long as this test is met.76 . . .
>
> Thus, after our careful study of the record, we must take a step back from the agency decision. We must look at the decision not as the chemist, biologist or statistician that we are qualified neither by training nor experience to be, but as a reviewing court exercising our narrowly defined duty of holding agencies to certain minimal standards of rationality.77 "Although [our] inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one." *Citizens to Preserve Overton Park v. Volpe, supra,* 401 U.S. at 416, 91 S.Ct. at 824, 28 Led.2d at 153. We must affirm unless the agency decision is arbitrary or capricious.78

The "narrow" scope of review under the "arbitrary and capricious" standard, under which "a court is not to substitute its judgment for that of the agency," with examples of when a court should reverse an agency, is set forth in *Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43 (1983), as follows:

> The scope of review under the "arbitrary and capricious" standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a

satisfactory explanation for its action including a "rational connection between the facts found and the choice made." *Burlington Truck Lines, Inc. v. United States,* 371 U.S. 156, 168 (1962). In reviewing that explanation, we must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Bowman Transportation Inc. v. Arkansas-Best Freight System, Inc., supra,* at 285; *Citizens to Preserve Overton Park v. Volpe, supra,* at 416. Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

In *In re Schepp's Dairy, Inc.,* 35 Agric. Dec. 1477 (1976), *aff'd,* No. 76-1984 (D.D.C. Aug. 15, 1977), *aff'd sub nom. Schepps Dairy, Inc. v. Bergland,* 628 F.2d 11 (D.C. Cir. 1979), it is explained that it is for the Secretary in his rulemaking capacity to make policy judgments based upon conflicting testimony and conflicting considerations, and that even though other regulatory alternatives might have been more persuasively reasonable, that is not enough to set aside, as illegal, the regulatory alternative selected by the Secretary. Specifically, it is stated (35 Agric. Dec. at 1493, 1495, 1497-98):

Section 8c(4) requires not only that order provisions be based upon record evidence, but that they also tend to effectuate the declared policy of the Act. Petitioner's argument ignores the discretionary power conferred upon the Secretary with respect to such finding. As noted earlier, there was extensive testimony at the hearing

relating to various approaches and considerations to be taken in determining the appropriate location adjustment. The fact that the Secretary chose one regulatory alterative over another cannot logically give rise to cries of illegality. *Lewes Dairy, supra* [401 F.2d 308 (3d Cir. 1968), *cert. denied,* 394 U.S. 929 (1969)], at page 319.

....

While the Secretary's finding as to the effectuation of the policy of the Act must be based on the evidence introduced at the hearing, there is no compulsion that the Secretary find that a proposal will tend to effectuate the statutory policy even though supported by evidence.

....

In order to successfully challenge the decision of the Secretary, petitioner cannot merely show that, on the balance, its position is supported by evidence in the record, or vaguely allege that the Secretary's decision is unsupported in the record. Petitioner has the substantial burden to overcome a strong presumption of the existence of facts which support the administrative determination. *Lewes Dairy, Inc., supra, pages* 315-316. The Act gives the Secretary broad discretionary powers to effectuate its purposes. The existence of regulatory alternatives, even those which might be more persuasively reasonable, is not cognizable on review, *Lewes, supra,* pages 317, 319.

This proceeding does not afford petitioner a forum to review questions of policy, desirability, or effectiveness of Order provisions, *In re Sunny Hill Farms Dairy Co.,* 26 A.D. 201, 217 [, *aff'd,* 446 F.2d 1124 (8th Cir.

1971), *cert. denied,* 405 U.S. 917 (1972)].[5] It is not sufficient for petitioner to show that the record may contain evidence supporting its positions. On the contrary, petitioner must establish clearly that the record cannot sustain the conclusion reached by the Secretary.

Moreover, under 5 U.S.C. § 706(2)(E), to the extent there is an evidentiary issue, petitioners must limit any § 8c(15)(A) challenge to the agency's formal rulemaking record, and the existence (or absence) of substantial evidence in that record for the Secretary's actions.

It has been recognized that a court's deference to administrative expertise "rises to zenith" in milk marketing cases because of the complexity of the regulatory program. As the court stated in *Blair v. Freeman,* 370 F.2d 229, 232 (D.C. Cir. 1966):

> A court's deference to administrative expertise rises to zenith in connection with the intricate complex of regulation of milk marketing. Any court is chary lest its disarrangement of such a regulatory equilibrium reflect lack of judicial comprehension more than lack of executive authority.

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[5] *Sunny Hill* cites (26 Agric. Dec. at 217):

> See, e.g., United States v. Howeth M. Mills, et al., *supra* [, 315 F.2d 828, 838 (4th Cir. *1963), cert. denied,* 375 U.S. 819 (1963)]; *In re Charles P. Mosby, Jr., d/b/a Cedar Grove Farms,* 16 A.D. 1209, 1220 (1957), *aff'd,* S.D. Miss., Jan. 5, 1959; *In re Clover Leaf Dairy Company,* 15 A.D. 339 (1956), *aff'd,* N.D. Ind., Sept. 10, *1958. Cf. Pacific States Box & Basket Co. v. White,* 296 U.S. 176, 182 (1935).

The unusual complexity of the milk marketing regulatory program has been recognized in numerous cases. For example, Judge Learned Hand stated in *Dairymen's League Coop. Ass'n, Inc. v. Brannan,* 173 F.2d 57, 65-66, *cert. denied,* 338 U.S. 825 (1949):

> We are indeed aware how great an advantage familiarity with the multifarious ramifications of such a subject as milk regulation gives to administrators, and how much less favored are we who must plunge into it unequipped. Nevertheless, we should have to endow them with almost supernatural powers, if they were not, like ourselves, at the outset stunned and confounded by the fantastic proliferation which emerges, when one attempts to find a path through such verbal mazes [of a milk order]....
>
> ...
>
> ... The regulation of an industry such as this ... is an undertaking of monstrous difficulty; it yet remains to be seen whether success is within the compass of human abilities. Those charged with such duties must proceed as best they can, correcting their initial blunders, as experience teaches; some ineptitudes and some injustices are inevitable at the start; they are the price of the undertaking as a whole.

Judge Clark similarly stated in *Crowley's Milk Co. v. Brannan,* 198 F.2d 861, 862 (2d Cir. 1952):

> It is now no secret that governmental regulation of the distribution of milk is complex and mystifying. Even so, this case appears to set a record of its own. For the question of classification for the purpose of payment of the milk product here in issue, at first blush apparently

simple, has baffled even the experts and the trade for several years.

In Waddington Milk Co. v. Wickard, 140 F.2d 97, 102 (2d Cir. 1944), the court observed:

> The order is complicated and detailed; certainly it appears more likely to achieve fairness in the greater number of cases then any we can think of or suggest.

The Seventh Circuit, in an outstanding opinion upholding an administrative decision under a milk order, notwithstanding the fact that the administrative requirements could, to a disinterested observer, appear "to be a marvelous example of government nuttiness," creating a "necessity for [a] weird piece of human behavior" *(County Line Cheese Co. v. Lyng,* No. 86-2357, slip op. at 15 (7th Cir. July 9, 1987) (concurring opinion by Chief Judge Bauer)), states (slip op. at 10, n.1):

> "The milk problem is so vast that fully to comprehend it would require an almost universal knowledge ranging from geology, biology, chemistry and medicine to the niceties of the legislative, judicial and administrative processes of government." *Queensboro Farm Products, Inc. v. Wickard,* 137 F.2d 969, 975 (2d Cir. 1943) (Frank, J.).

The court in *County Line* also quotes the holding in *Queensboro that* (id. at 10):

> The Supreme Court has admonished us that interpretations of a statute by officers who, under the statute, act in administering it as specialists advised by experts must be accorded considerable weight by the courts." (footnotes omitted) 137 F.2d at 980. Similar weight is due the

> Secretary's [the court's footnote is quoted immediately above] interpretation of the regulations he propagates. *United States v. Larionoff,* 97 S. Ct. 2150, 2155, 431 U.S. 864, 872 (1977).

In *Ogden Dairy Co. v. Wickard,* 157 F.2d 445, 446 (7th Cir. 1946), *cert. denied, 330* U.S. 827 (1947), the court stated that the "complexities" of the milk program "are immediately apparent," and in *United States* v. *Lehigh Valley Coop. Farmers,* 183 F. Supp. 80, 89 (E.D. Pa. 1960), *rev'd on other grounds,* 287 F.2d 726 (3d Cir. 1961), *rev'd,* 370 U.S. 76 (1962), the court referred to the milk regulatory program as a "very complicated area of Federal regulation...." From my own 29-year involvement with the milk regulatory program, I share the foregoing views as to the complexity of the milk regulatory program and the litigation arising under the program.[6]

Here, as in *Driscoll v. Edison Light & Power Co.,* 307 U.S. 104, 122 (1939) (concurring opinion by Mr. Justice Frankfurter), the Secretary was dealing with issues that do "not present questions of an essentially legal nature in the sense that legal education and lawyers' learning afford peculiar competence for their adjustment."

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[6] From 1950 to 1960, I participated in every milk case appealed to the Federal appellate courts. Since July 1972, I have decided every milk case appealed to the Secretary.

II. The Act Limits the Scope of Inquiry in This Proceeding to the Matters Raised in the Petitions Filed by Petitioners, and Does Not Permit an Award of Monetary Damages.

Before considering the substantive issues raised in this proceeding, it is important to recognize two limitations applicable to proceedings under § 8c(15)(A) of the Act (7 U.S.C. § 608c(15)(A)). First, the ALJ and the Judicial Officer can only rule on matters raised in the Petitions filed by petitioners. Second, the Act does not permit an award of monetary damages.

A. The Act Limits the Scope of Inquiry in a § 8c(15)(A) Proceeding to the Matters Raised in the Petitions Filed by Petitioners.

Section 8c(15)(A) of the Act provides (7 U.S.C. § 608c(15)(A) (emphasis added)):

> **(15) Petition by handler for modification of order or exemption; court review of ruling of Secretary**
>
> (A) *Any handler* subject to an order *may file a written petition with* the Secretary of Agriculture, *stating that any such order or any provision of any such order or any obligation imposed in connection* therewith *is not in accordance with law and praying for a modification thereof or to be exempted therefrom.* He shall thereupon be given an opportunity for a hearing *upon such petition,* in accordance with regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling *upon the prayer of such petition* which shall be final, if in accordance with law.

Under the plain terms of the Act, the Secretary's authority is limited to ruling "upon the prayer of such petition" (7 U.S.C. § 608c(15)(A)). This principle was recently stated in *In* re *Farm Fresh, Inc.*, 49 Agric. Dec. 23, 79-80 (1990), *aff'd on other grounds,* CIV-90-688 T (W.D. Okla. June 24, 1991), as follows:

> In addition to disagreeing with the ALJ on the merits of the Notice of Hearing issue, I disagree with the ALJ on procedural grounds. That is, I believe that it was inappropriate for the ALJ to hold that the Notice of Hearing (and therefore the amendatory order) was invalid on the basis of a sentence in the Notice of Hearing not relied upon by the petitioner. It should be noted that this is not the typical proceeding brought before the ALJs whereby the Department is the complainant, and the ALJ might appropriately note *sua sponte* a ground of *defense* not noticed by the respondent's counsel. Rather, a § 8c(15)(A) proceeding is instituted by a private party, who is responsible for framing the issues. Under § 8c(15)(A) of the Act (7 U.S.C. § 608c(15)(A)), only a handler may file "a written petition" challenging an order, or any provision thereof, after which the handler shall be given opportunity for a hearing "upon such petition, in accordance with regulations made by the Secretary," and with a ruling made "upon the prayer of such petition. . . ." Neither the statute nor the Rules of Practice authorize an ALJ or the Judicial Officer to challenge an order or a provision thereof upon a basis not raised by the handler. The Rules of Practice require the petition to specifically state the "grounds" for the challenge (7 C.F.R. § 900.52(b)(4)), limit the evidentiary record to matters relevant and material to those grounds (7 C.F.R. § 900.60(d)), and require the ALJ to base his decision on that record (7 C.F.R. § 900.64(c)).

> Even though the petitioner contested the adequacy of the Notice of Hearing in its petition, petitioner did not rely on the ground relied upon by the ALJ in holding that the Notice of Hearing was inadequate. Accordingly, I believe that it was error for the ALJ to raise *sua sponte* the issue as to whether the sentence limiting the receipt of evidence "to the economic and marketing conditions which relate to the location adjustment provisions of the proposed merged and expanded Southwest Plains marketing area" precluded the receipt of evidence on the issue as to whether Lincoln County should be placed in Zone I.

The Judicial Officer has suggested, by way of dicta, that in a *disciplinary* proceeding instituted by the Department, it might be appropriate to permit an amendment to the complaint at the conclusion of the hearing to conform to the proof. *See In re Steinberg Bros. Co.*, 43 Agric. Dec. 1878, 1896 n. 22, 1902-03 (1984). But that practice would not be appropriate in a § 8c(15)(A) proceeding such as this, in view of the express statutory language discussed above, and the industry-wide effect of the decision in a § 8c(15)(A) proceeding.

B. The Act Does Not Authorize the Award of Monetary Damages.

Under the plain terms of the Act, a handler's Petition under § 8c(15)(A) of the Act is limited to "stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law *and praying for a modification thereof or to be exempted therefrom,"* and the Secretary is limited to ruling "upon the prayer of such petition" (7 U.S.C. § 608c(15)(A) (emphasis added)). There is no authorization in the Act, the Marketing Orders, or the Rules of Practice for consequential damages (as distinguished from a return of

monies paid) to be awarded in § 8c(15)(A) proceedings. In over 50 years of proceedings under this Act, consequential damages were not awarded until a district court awarded interest in *Cumberland Farms, Inc. v. Lyng,* CIV. No. 88-2406 (D.N.J. July 18, 1989), with which I disagree. In some cases, petitioners and the ALJ have attempted to distinguish fruit and vegetable orders from milk orders by contending that the latter orders only involve monies paid, and never consequential injury. (See *In re Wileman Bros. & Elliott, Inc. (Wileman II), 50* Agric. Dec. __, slip op. at 40 (Sept. 30, 1991), *appeal docketed,* No. CV F 90-473 OWW (E.D. Cal. Oct. __, 1991.)) This allegation is incorrect. For example, a milk supply plant might well suffer only consequential damages from a pooling provision that required an unlawfully high percentage of its milk to be delivered to distributing plants. Nonetheless, no case (except *Cumberland Farms)* has ever been decided under milk orders or fruit and vegetable orders which would allow for interest or other consequential damages.

There have, of course, been some milk cases in which, as a result of a determination that an obligation to pay money imposed on a milk handler by a Market Administrator was unlawful, refunds have been made to the handler. *See, e.g., In re Defiance Milk Products Co.,* 44 Agric. Dec. 11, 59 (1985), *aff'd on other grounds,* No. 85-7179 (N.D. Ohio Dec. 12, 1986), *affd,* 857 F.2d 1065 (6th Cir. 1988), *reprinted in* 47 Agric. Dec. 1377 (1988). But even "where a handler has been awarded money in a § 8c(15)(A) proceeding, interest [i.e., consequential damage] has never been awarded." *Id.* at 60.

Furthermore, even though an obligation unlawfully imposed on a milk handler might permit a return of the money unlawfully exacted from the handler, the general practice in this Department is first to give the Secretary the opportunity,

in his rulemaking capacity, to correct the error, retroactively. As stated in *In re Farm Fresh, Inc.*, 49 Agric. Dec. 23, 99-101 (1990), *aff'd on other grounds,* CIV-90-688 T (W.D. Okla. June 24, 1991), *printed in* 50 Agric. Dec. 1, 1991, *appeal docketed, No.* 91-6286 (10th Cir. Aug. 8, 1991):

> Since I am dismissing the petition, it is unnecessary for me to rule on what relief would have been appropriate if the petition were not dismissed. However, if the petition were not dismissed, I would have remanded the proceeding for the Secretary to determine the appropriate remedy in his legislative capacity, for the reasons set forth in Respondent's Appeal Petition at 36-69, attached as Appendix B, and Respondent's Reply Brief filed Oct. 11, 1988, at 5-7, attached as Appendix C. (These excerpts from respondent's briefs will not be published in Agriculture Decisions, since it is not necessary for me to decide this issue.)

As stated in *In re Baker & Sons, Dairy, Inc.*, 48 Agric. Dec. [818, 865-66 (1989)], *appeal docketed sub nom.* [*Kinnett Dairies, Inc. v. Yeutter,* No. 89-106-COL (D. Ga. Oct. 10, 1989)]:

> VI. *If the Secretary's Temporary, Emergency Rulemaking Action Were Found Unlawful, the Proper Course Would Be to Remand the Matter to the Secretary for Lawful Action.*
>
> If the Secretary's temporary, emergency rulemaking action were held to be unlawful, the proper course would be to remand the proceeding to the Secretary to determine in his legislative capacity the appropriate action to be taken, which might or might not result in any payment to petitioners. See *In re Defiance Milk Products Co.*, 44 Agric. Dec.

11, 57-62 (1985), *aff'd on other grounds,* No. 85-7179 (N.D. Ohio Dec. 12, 1986), *aff'd,* 857 F.2d 1065 (6th Cir. 1988);[8] *In re Borden, Inc.,* 37 Agric. Dec. 987, 997-1000 (1978), *remanded,* 38 Agric. Dec. 1061 (1979),[9] *dismissed per*

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[8]In *Defiance*, the Judicial Officer recognized that some courts had awarded monetary relief to some handlers, but the Judicial Officer did not adopt that policy as the proper Departmental policy.

[9]In *In re Borden, Inc.,* 38 Agric. Dec. 1061 (1979) (remand order), the Judicial Officer remanded the proceeding to the ALJ to determine the damages [i.e., the return of money paid by the handler]. But that remand order does not reflect the Department's customary practice, since the remand order related to two related proceedings, one of which was controlled by a court decision holding that Borden was entitled to recover overpayments from the producer-settlement fund. *Borden, Inc. v Butz, 544* F.2d 312, 319-20 (7th Cir. 1976).

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settlement agreement, 40 Agric. Dec. 1711 (1979); *In re Babcock Dairy Co. of Ohio,* 35 Agric. Dec. 431, 444-46 (1976), *remanded sub nom. American Dairy of Evansville, Inc. v. Bergland,* 627 F.2d 1252, 1261-62 (D.C. Cir. 1980) (remanding case to the Secretary to issue new provisions supportable on the record or to hold a new hearing on the issue, at the Secretary's discretion, while granting petitioner prospective relief in the interim).

In some cases, courts have remanded proceedings for further administrative consideration. See, *e.g., Addison v.Holly Hill Fruit Prods., Inc.,* 322 U.S. 607, 619-23 (1944) (remand is the proper course where part of a rule is deemed invalid, so that the Administrator can retrospectively act as he would have done if he had limited himself to statutory authority); *American Dairy of Evansville, Inc. v. Bergland, supra; Rodway v. USDA,* 514 F.2d 809, 817-18 (D.C. Cir. 1975) (rule invalidated and proceeding remanded to the Secretary for a new rulemaking proceeding in compliance with the APA, with invalidated regulation to remain in effect in interim).

In other cases, courts have refused to give refunds to prevailing parties, notwithstanding the illegality of administrative action. See, *e.g., Blair v. Freeman,* 370 F.2d 229, 239-40 (D.C. Cir. 1968) (where "nearby differential" was held invalid, equitable considerations precluded refund to prevailing parties). See, also, *Lehigh Valley Coop. Farmers, Inc. v. United States,* 370 U.S. 76, 99 (1962) (where regulation held invalid, Court left open question as to whether Secretary could retrospectively apply new regulation to impounded funds); *accord United States v. Morgan,* 307 U.S. 183, 185-98 (1939).

In *In re Defiance Milk Products Co.,* 44 Agric. Dec. 11, 57-59 (1985), *aff'd on other grounds,* No. 85-7179 (N.D. Ohio Dec. 12, 1986), *aff'd,* 857 F.2d 1065 (6th Cir. 1988), *reprinted in* 47 Agric. Dec. 1377 (1988), referred to in the preceding quotation, it is stated:

III. *If the Secretary's Temporary Rulemaking Action Were Found Unlawful, the Proper Course Would Be to Remand the Matter to the Secretary for Lawful Action.*

After concluding that it was unlawful for the Secretary to refuse to adopt petitioner's proposal, the ALJ ruled (Initial Decision at 28):

> The result of the Secretary's action was that petitioner was required to pay 40 cents per hundredweight more for producer milk than its competitors marketing other Class III products. The proper remedy in such circumstances is for the Market Administrator of Order 33 to reimburse petitioner the amount of this overcharge.

In the first place, petitioner was not required to pay more for milk than its competitors making evaporated ~~milk or any of the~~ other 14 products remaining in Class III. Only handlers making butter, nonfat dry milk and cheese (except cottage cheese and cottage cheese curd) benefited from the temporary price reduction. All handlers of the 15 products remaining in Class III, including other handlers making evaporated milk, continued to pay the same basic formula price previously set by a valid rulemaking proceeding.

But even if the Secretary's rulemaking action were held to be unlawful, the proper course would be to remand the proceeding to the Secretary to determine in his legislative capacity the appropriate action to be taken, which might or might not result in any payment to petitioner.

If, for example, the Secretary's temporary rulemaking action were held unlawful because the Secretary failed to explain in his rulemaking decision that he was actually reclassifying milk used to produce butter, nonfat dry milk and cheese (except cottage cheese and cottage cheese curd) in a new Class III(A), priced 40¢ less than the basic formula price applicable to Class III, the obvious remedy would be for the Secretary to amend his findings and conclusions, which would eliminate the illegality.

If, on the other hand, it were held (i) that substantial evidence does not support putting butter, nonfat dry milk and cheese (except cottage cheese and cottage cheese curd) in the temporary, new Class III(A), or (ii) that it is unlawful to include butter, nonfat dry milk and cheese (except cottage cheese and cottage cheese curd) in the temporary, new Class III(A) without also including evaporated milk, the Secretary might (a) want to hold a new hearing to determine *nunc pro tunc* what temporary action should have been taken (which could take any one of numerous forms), (b) acquiesce in the determination of illegality and annul the temporary rulemaking action as to all handlers, or (c) include evaporated milk (and perhaps other products) in the temporary, new Class III(A). There would be no basis for binding the Secretary to take only one action, *viz.*, include evaporated milk, but none of the other 14 products that would remain in Class III, in the new Class III(A).

Where it has been administratively determined that the Secretary's rulemaking action is unlawful, it has been the practice in this Department for more than 40 years to remand the proceeding to the Secretary, rather than for the ALJs or the Judicial Officer to take corrective rulemaking action. See, *e.g.*, *In re Borden, Inc.*, 37

Agric. Dec. 987, 997-1000 (1978), *remanded,* 38 Agric. Dec. 1061 (1979), *dismissed per settlement agreement,* 40 Agric. Dec. 1711 (1979); *In re The Babcock Dairy Co. of Ohio,* 35 Agric. Dec. 431, 444-46 (1976), *remanded sub nom. American Dairy of Evansville, Inc. v. Bergland,* 627 F.2d 1252, 1261-62 (D.C. Cir. 1980) (remanding case to the Secretary to issue new provisions supportable on the record or to hold a new hearing on the issue, at the Secretary's discretion, while granting petitioner prospective relief in the interim).

Even during the period prior to 1980, when the delegation of authority to the Judicial Officer included authority to perform "any regulatory function" (7 C.F.R. § 2.35 (1979)), which is not now in the Judicial Officer's delegation of authority (7 C.F.R. § 2.35 (1984)), in actual practice, the Judicial Officer always refrained from exercising any rulemaking function. Flavin, "The Functions of the Judicial Officer, USDA," in 26 Geo. Wash. L. Rev. 277, 278 n. 9 (1958) (written by the Department's Judicial Officer from 1942 to 1972).

In similar situations, courts also frequently remand proceedings for further administrative consideration. See, *e.g., Addison v. Holly Hill Fruit Prods., Inc.,* 322 U.S. 607, 619-23 (1944) (remand is the proper course where part of a rule is deemed invalid, so that the Administrator can retrospectively act as he would have done if he had limited himself to statutory authority); *American Dairy of Evansville, Inc. v. Bergland, supra; Rodway v. USDA,* 514 F.2d 809, 817-18 (D.C. Cir. 1975) (rule invalidated and proceeding remanded to the Secretary for a new rulemaking proceeding in compliance with the APA, with invalidated regulation to remain in effect in interim).

In other cases, courts have refused to give refunds to prevailing parties, notwithstanding the illegality of administrative action. See, *e.g., Blair v. Freeman,* 370 F.2d 229, 239-40 (D.C. Cir. 1968) (where "nearby differential" was held invalid, equitable considerations precluded refund to prevailing parties). See, also, *Lehigh Valley Coop. Farmers, Inc. v. United States,* 370 U.S. 76, 99 (1962) (where regulation held invalid, Court left open question as to whether Secretary could retrospectively apply new regulation to impounded funds); *accord United States v. Morgan,* 307 U.S. 183, 185-98 (1939).

Courts have, however, awarded relief to prevailing parties in some cases distinguishable from the present case. In *Fairmont Foods Co. v. Hardin,* 442 F.2d 762 (D.C. Cir. 1971), a handler challenged the 1965 promulgation of a higher Class I price applicable to its plant location and requested a refund of the difference between the pre-1965 price and the higher price it had been forced to pay between 1965 and 1968 as a result of the amendment. Id at 766 n. 16. The court set aside the amendment because the rulemaking record did not contain substantial evidence to support it. Id. at 767. The court concluded that the plaintiff was entitled to recover the "overpayments which it made pursuant to this invalid Order." *Id.* at 773.

In Fairmont Foods, the court held that the handler should only have paid the price set by the valid Order provision which preceded the invalid amendment, and that the "overpayments" should be returned to the handler. In the present case, however, the price petitioner paid for milk in June and July 1983 was the same price it had been paying which had been set by a valid Order provision not even challenged in this proceeding. There

is no prior, valid price to revert to, as in *Fairmont Foods,* because the prior, valid price is the one which petitioner paid in this case.

Similarly, in *Borden, Inc., v. Butz,* 544 F.2d 312, 319-20 (7th Cir. 1976), and *Abbotts Dairies Division of Fairmont Foods, Inc., v. Butz,* 584 F.2d 12, 16-21 (3d Cir. 1978), handlers challenged order amendments which raised the Class I price for their milk above the level at which it had been previously set. The courts found insufficient evidence for the amendments, and, therefore, held that they were invalid. The handlers' recoveries were based on the fact that they had paid a price set by invalid Order provisions. But, as stated above, here petitioner's price for milk was set by a prior, valid Order provision. Accordingly, those cases are not analogous to the situation here.

In the present case, if the Secretary's temporary, rulemaking action were held unlawful, I would adhere to the Department's settled practice for over 40 years, and remand the proceeding to the Secretary for further legislative consideration. That action is particularly appropriate here in view of the numerous, reasonable options available to the Secretary, if his original, temporary action were held invalid.

Similarly, in *In re Sequoia Orange Co.,* 47 Agric. Dec. 2, 191 (1988), *aff'd in part and remanded sub nom. Riverbend Farms, Inc. v. Yeutter,* No. CV F-88-98 EDP (E.D. Cal. June 14, 1989), *printed in* 48 Agric. Dec. 1 *(1989), appeal docketed, No.* 90-15505 (9th Cir. April 24, 1990), No. 90-15781 (9th Cir. June 11, 1990), it is stated:

Finally, even if petitioners had properly made A case as to the omission of alterative views (which they did

not), and I believed such an omission to be legal error (which I do not), rather than hold invalid those weekly volume regulations where petitioners proved their case, in this respect, I would have remanded the matter to the Division Director to make a determination at the present time as to whether the additional information would have altered the regulation for the week in question. *See Addison v. Holly Hill Fruit Products, Inc.*, 322 U.S. 607, 619-23 (1944); *In re Oak Tree Farm Dairy, Inc.*, 38 Agric. Dec. 113, 165-66 (1979) (decision on remand), *aff'd*, 544 F. Supp. 1351 (E.D.N.Y. 1982).

However, irrespective of whether the Secretary should be permitted to correct an error retroactively, where error has been found in a § 8c(15)(A) proceeding, an award of monetary damages (as distinguished from a return of money already paid) is not permitted by the Act.

III. The Lawfulness of an Order or Provision Thereof or Regulation Issued Thereunder Must Be Determined Only Upon the Basis of the Evidence Before the Secretary in the Formal or Informal Rulemaking Records, and Not by Evidence Received at a § 8c(15)(A) Proceeding.

It is well settled that the lawfulness of a Marketing Order or a provision thereof or a regulation issued thereunder must be judged by the facts contained in the formal or informal hearing record, rather than by facts petitioners would seek to introduce at a § 8c(15)(A) hearing. *See Dairymen's League Coop. Ass'n v. Brannan*, 173 F.2d 57, 66 (2d *Cir.), cert. denied*, 338 U.S. 825 (1949); *Beatrice Creamery Co. v. Anderson*, 75 F. Supp. 363, 367 (D. Kan. 1947); *Bailey Farm Dairy Co. v. Jones*, 61 F. Supp. 209, 228 (E.D. Mo. *1945), aff'd*, 157 F.2d 87 (8th Cir.), *cert. denied*, 329 U.S. 788

(1946); *In re Sequoia Orange Co.*, 41 Agric. Dec. 1511, 1521-23 (1982), *order transferring case,* No. 82-2510 (D.D.C. June 14, 1983), *aff'd on other grounds,* No. CV F 83-269 (E.D. Cal. Dec. 21, 1983). This has been true for almost 50 years, as this quotation from *Lamers Dairy* makes clear *(In re Lamers Dairy, Inc.,* 36 Agric. Dec. 265, 280-84 (1977), *aff'd, No.* 77-C- 173 (E.D. Wis. Sept. 28, 1977), *printed in* 36 Agric. Dec. 1642 (1977), *aff'd,* 607 F.2d 1007 (7th Cir. 1979) (unpublished), *cert. denied,* 444 U.S. 1077 (1980)), as follows:

> The petitioners have misconceived the basic nature of a review proceeding under § 8c(15)(A) of the Agricultural Marketing Agreement Act of 1937 (7 U.S.C. 608c(15)(A)). An action brought pursuant to § 8c(15)(A) of the Act is not a trial *de novo* but rather is a proceeding to review the record, on which the challenged administrative decision is based, to determine whether the administrative decision is based on substantial record evidence. *Wawa Dairy Farms v. Wickard, 56* F. Supp. 67, 70 (E.D. Pa.), affirmed, 149 F.2d 860, 862 (C.A. 3); *Windham Creamery, Inc. v. Freeman,* 230 F. Supp. 632, 633 (D.N.J.), affirmed, 350 F.2d 978 (C.A. 3), certiorari denied, 382 U.S. 979. See also, *In re College Club Dairy, Inc., et al., 15* Agriculture Decisions 367, 371 (1956).
>
> The petitioners have the right to contend in this proceeding that the Class I price under Federal Order No. 30 is too high and that the pool plant qualification standards are too low. But the question is, upon what record is the determination as to the validity of such Order provisions to be made?
>
> It has been settled for more than 30 years that evidence such as that proffered by petitioners in this case

is not admissible in a review proceeding under § 8c(15)(A) of the Act. *In re Andrew W. Leonberg, 32* Agr Dec 763, 792-793 (1973), appeal pending, it is stated:

> It is well established that when the lawfulness of the Order itself or a provision thereof is attacked, the Act affords no trial *de novo* by way of the 8c(15)(A) petition. The Order must stand or fall upon the basis of the evidence before the Secretary adduced during the promulgation proceedings, and additional evidence is not relevant or admissible in the 8c(15)(A) proceeding. "To allow evidence [in the 8c(15)(A) proceeding not presented in the promulgation proceeding] would be to reopen, rather than to judge, the promulgation proceeding." *United States v. Mills,* 315 F.2d 829, 836 (C.A. 4), certiorari denied, 374 U.S. 832. Accord: *Dairymen's League Cooperative Ass'n v. Brannan,* 173 F.2d 57, 66 (C.A. 2), certiorari denied, 338 U.S. 825; *In re Terrace Park Dairy,* 12 Agriculture Decisions 1383, 1396-1397 (1953); *Sprague Dairy Co. v. Anderson,* 6 Agriculture Decisions 729 *(N.D. Ill).* See, also, *Acme Fast Freight, Inc. v. United States,* 154 F. Supp. 239, 241 (S.D.N.Y.).[7]

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[7] *Lewes Dairy, Inc. v. Freeman,* 401 F.2d 308, 315-19 (1968), *cert. denied,* 394 U.S. 929 (1969), is not to the contrary. In that case, the relevant "record" was the record of the evidence adduced at the § 8c(15)(A) proceeding, rather than the evidence adduced at the formal rulemaking hearing, but that was because the issue was whether the challenged Order provisions, as applied to the particular handler challenging the Order, created an illegal trade barrier, which is expressly prohibited by the Act (401 F.2d at 310-20).

> This exclusionary rule is necessary to maintain the integrity of the regulatory program. The promulgation of an Order or an amendment thereto is formal rulemaking subject to section 7 of the Administrative Procedure Act (5 U.S.C. § 556), which provides that no rule shall be issued except as "supported by and in accordance with the reliable, probative, and substantial evidence." Section 8c(4) of the Agricultural Marketing Agreement Act (7 U.S.C. 608c(4)) requires that in issuing an Order the Secretary shall find upon the evidence introduced at the promulgation hearing that issuance of the Order will tend to effectuate the declared policy of the Act. The administrative process would be seriously disrupted if the Secretary based his determination to issue an Order upon the evidence before him, while the validity of his determination was later judged upon different evidence. Therefore, any new, relevant evidence bearing upon the validity of the Order must be presented first to the Secretary in his legislative, and not in his judicial capacity.[4]

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[4]Some of the petitioners' evidence would have been irrelevant even in a rulemaking proceeding, *e.g.*, evidence relating to other marketing areas.

Similarly, in *In re Cloverleaf Dairy Co.*, 4 Agriculture Decisions 627, 632-633 (1945), affirmed *sub nom. Sprague Dairy Company v. Anderson,* 6 Agriculture Decisions 729 (N.D. Ill.), the Judicial Officer stated:

> Petitioners do not claim that Order No. 69 as a whole is invalid. They ask that the order be

modified to exclude certain territory in Will County from the marketing area defined or that petitioners be exempted from the operation of the order, because (1) the handling of milk by petitioners is not in the current of interstate commerce and does not directly burden obstruct or affect interstate commerce in milk or milk products, and (2) there is no need to include Will County under the order and such inclusion is arbitrary because there were no disorderly marketing conditions, because petitioners had satisfactory relationships with producers, and because the markets in Will County, such as Joliet, are purely local markets separated from Chicago by miles of rural territory.

Petitioners insist that they are entitled under the act to a *de novo* bearing on their petition, that is, that they are entitled, apart from the promulgation hearings, to introduce and to have considered evidence on the allegations in their petition.

The issuance of Order No. 69 was *quasi-legislative in* character. Section 8c of the act requires notice, hearing and a finding, upon the basis of evidence adduced at the hearing, that the order and all its terms and provisions will tend to effectuate the declared policy of the act. This proceeding is one for *review* and is of a *quasi-judicial* nature. Certainly, then, petitioners' complaints that the inclusion of Will County is arbitrary, contrary to the facts, will not effectuate the policy of the act, etc., must be evaluated in the light of the record upon which the order was promulgated, rather than by means of other and different evidence produced at a hearing in this proceeding. I think the same conclusion ought to apply to petitioners' contentions

that the handling of milk in Will County is not in the current of interstate commerce and does not directly burden, obstruct, or affect interstate commerce in milk or milk products. The answer on this point is not entirely free from doubt but, in addition to the notice, hearings and findings referred to above, the order was accompanied by a finding of (sec. 969.0(a)(4)) that the handling of milk in the marketing area defined "is in the current of interstate commerce, or directly burdens, obstructs, or affects interstate commerce in milk and its products." I think, then, that the allegations as to absence of any interstate commerce grounds for including Will County in the marketing area must also be considered upon the basis of the evidence adduced at the promulgation hearings.

These conclusions denying petitioners a *de novo* hearing do not, as petitioners seem to believe, deprive them of a hearing. The decision is that the *scope* of the hearing is restricted to examination and consideration of the evidence in the promulgation record.

The Court, in affirming the Judicial Officer's decision in the *Cloverleaf Dairy Co.* case, just quoted, stated *(Sprague Dairy Company v. Anderson,* 6 Agriculture Decisions 729 (N.D. Ill.)):

The validity of a marketing order issued pursuant to the Agricultural Marketing Agreement Act of 1937 must be adjudged on the basis of the promulgation hearing record which precedes the issuance of such an order and upon which such an order must be predicated.

It has consistently been held that evidence which goes to the soundness of the Secretary's decision as to an Order, to whether an Order should be amended, to the practicality, effectiveness or desirability of an Order, or to whether the Order effectuates the declared policy of the Act, is properly presented to the Secretary only in his quasi-legislative capacity, that is, in a quasi-legislative bearing being held pursuant to §§ 8c(3) and (4) of the Act, and may not properly be presented to the Secretary in his quasi-judicial capacity in a § 8c(15)(A) review proceeding. See *In re William S. Wright,* 2 Agriculture Decisions 327; 2 Agriculture Decisions 383, 384-385 (1943); *In re Abbots Dairy,* 2 Agriculture Decisions 553, 555-556 (1943); *In re Brucer Dairy,* 2 Agriculture Decisions 661, 662 (1943); 3 Agriculture Decisions 247, 249-250 (1944); *In re Roberts Dairy Company, 4* Agriculture Decisions 84, 89 (1945); *In re Cloverleaf Dairy Co., et al., 4* Agriculture Decisions 627, 632-633 (1945), affirmed *sub nom. Sprague Dairy Company v. Anderson,* 6 Agriculture Decisions 729 (N.D. *Ill.); In re Edward J. Vagim,* 17 Agriculture Decisions 167, 168-169 (1958); *In re Cedar Grove Farms,* 21 Agriculture Decisions 983, 985 (1962); *In re Colonel Norman J. Riebe,* 22 Agriculture Decisions 350, 351 (1963); *In re Producers Creamery Company of Springfield,* 23 Agriculture Decisions 515, 516 (1964); *In re Arvin Rawlings and Blair Greaves,* 28 Agriculture Decisions 1222, 1223 (1969); *In re Diamond State Dairies, Inc.,* 25 Agriculture Decisions 1189, 1192 (1966); *In re Tuscan Dairy Farms, Inc., et al.,* 30 Agriculture Decisions 1135, 1148 (1971), affirmed, *Tuscan Farms v. Hardin,* 31 Agriculture Decisions 1126, 1127-1130 (D. N.J. 1972); *In re Hawthorn-Mellody, Inc., 30* Agriculture Decisions 1774, 1791 (1971); *In re Fitchett Bros., Inc., 33* Agriculture Decisions 257, 265 (1974); *In re Michaels*

Dairies, Inc., 33 Agriculture Decisions 1663, 1701, 1727 (1974), affirmed [mem.], [546 F.2d 1043] (No. 75-2023, C.A. D.C. decided December 17, 1976).[5]

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[5]There is no basis for petitioners' contentions (Appeal, p. 4) that the evidence admitted in promulgation hearings is narrow in scope and that evidence cannot be adduced in support of the legal questions involved in Orders to be promulgated. See 7 CFR 900.8.

Petitioners must confine their challenges to the rulemaking record before the Secretary at the time of the rulemaking, "not some new record made initially in the reviewing court." *Camp v. Pitts,* 411 U.S. 138, 142 (1972). "With respect to factual contentions, the (15)(A) process can only test the validity of the Order by the facts contained in the promulgation hearing record—which are not challenged by petitioners. Hence petitioners seek relief in the wrong forum." *In re Sequoia Orange Co.,* 47 Agric. Dec. 2, 99 (1988), *aff'd in part and remanded sub nom. Riverbend Farms, Inc. v. Yeutter,* No. CV F-88-98 EDP (E.D. Cal. June 14, 1989), *printed in* 48 Agric. Dec. 1 (1989), *appeal docketed,* No. 90-15505 (9th Cir. April 24, 1990), No. 90-15781 (9th Cir. June 11, 1990). Furthermore, it must be presumed (until proven contrary) that substantial evidence in the promulgation hearing record supports all of the provisions of an Order. *See United States v. Rock Royal Co-op., Inc,,* 307 U.S. 533, 567-68 (1939); *Pacific States Box & Basket Co. v. White,* 296 U.S. 176, 184-85 (1935); *Borden's Farm Prods. Co. v. Baldwin,* 293 U.S. 194, 209 (1934). If that evidence is faulty, or if circumstances have changed so that the Order no longer produces equitable results, the remedy is through the amendatory or termination process—not through a § 8c(15)(A) proceeding.

In the present case, petitioners did challenge the adequacy of the evidence in the formal rulemaking record supporting the Order provisions at issue here. Nonetheless, they also challenged the Order provisions on the basis of evidence and *post hoc* rationale (a federal district court's transcript of a case litigated after the rulemaking record was closed) erroneously treated by the ALJ as if it had been received at the § 8c(15)(A) hearing (see § IV, *infra*). That cannot lawfully be done. As shown below, the ALJ's reliance on such § 8c(15)(A) "evidence" was error.

IV. The ALJ Erred Both in Relying Upon the Amended Petition (Containing Alleged Inconsistent Departmental Rationale for the Rulemaking Gleaned From a Related District Court Case Heard After the Final Decision in the Rulemaking) and in Defaulting Respondent's Answer for Not Being Signed by the Administrator.

The ALJ found respondent in default because respondent's Answer to Petitioners' Amended Petition (Mar. 2, 1990) was signed by the respondent's counsel and not by the Administrator, as the ALJ stated was required by the Rules of Practice (7 C.F.R. § 900.52a). I find this to be error, and, for the reasons below, I reinstate respondent's Answer of March 2, 1990, *nunc pro tunc*. Also, it was error for the ALJ to rely upon the Amended Petition, containing as it did *post hoc* allegations and rationale from a related federal district court proceeding that occurred after the close of the rulemaking record.

A. The ALJ Erred in Defaulting Respondent's Answer for Not Being Signed by the Administrator.

Respondent appeals that part of the Initial Decision (pp. 4-5, July 12, 1990) where the ALJ deemed "admitted by respondent" the allegations of the Amended Petition of January 29, 1990. The ALJ concluded that the Rules of Practice (7 C.F.R. § 900.52a) require "that the Administrator of the Agricultural Marketing Service shall answer petitions" (Initial Decision at 4), and since only the trial attorney, Mr. Cooper, had signed the Answer, "the purported answer to the amended petition has been filed outside the rules with the consequence that allegations of fact expressed in the amended petition are considered admitted by respondent" (Initial Decision at 5).

I find this ruling by the ALJ to be incorrect for several reasons, and it is hereby overruled. For the reasons below, the respondent's Answer of March 2, 1990, is hereby accepted *nunc pro tunc.*

In the first place, there is nothing in the Department's Rules of Practice governing § 8c(15)(A) proceedings that provides for a default (admission of facts) if the Answer is signed by the wrong person, or even if an Answer is not filed at all (7 C.F.R. §§ 900.50.71). This is in sharp contrast to the Rules of Practice applicable to disciplinary proceedings instituted by the Department, which provide (7 C.F.R. §§ 1.136(a), (c)):

§ 1.136 Answer.

(a) *Filing and service.* Within 20 days after the service of the complaint ... the respondent shall file with

> the Hearing Clerk an answer signed by the respondent or the attorney of record in the proceeding....
>
> ....
>
> (c) *Default.* Failure to file an answer within the time provided under § 1.136(a) shall be deemed, for purposes of the proceeding, an admission of the allegations in the Complaint, and failure to deny or otherwise respond to an allegation of the Complaint shall be deemed, for purposes of the proceeding, an admission of said allegation, unless the parties have agreed to a consent decision pursuant to § 1.138.[8]

The inclusion of a default provision in the Department's disciplinary Rules of Practice, while not providing for such a default provision in the Department's § 8c(15)(A) Rules of Practice, is based on the fact that issues involved in a § 8c(15)(A) proceeding are too important to the public interest to be adversely affected or compromised by negligence or inaction in filing a timely Answer. If such default provisions were included in § 8c(15)(A) Rules of Practice, innocent producers would suffer—not the Department. Accordingly, the Department's § 8c(15)(A) Rules of Practice wisely do not permit a failure to file a timely Answer by the Department to operate as an admission of the facts pled in a Petition. It is not unusual, where the government is acting in its sovereign capacity carrying out a governmental function for the benefit of the public, to have different rules apply than the rules applied to private parties or to the government when it is

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[8] By way of analogy, the Federal Rules of Civil Procedure provide that "[a]verments in a pleading to which a responsive pleading is required . . . are admitted when not denied in responsive pleading" (FED. R. CIV. P. 8(d)).

acting in its proprietary capacity. *See, e.g., Schweiker v. Hansen,* 450 U.S. 785, 786-91 (1981); *Federal Crop Ins. Corp. v. Merrill, 332* U.S. 380, 383-86 (1947); *United States v. State of Florida,* 482 F.2d 205, 209 (5th Cir. *1973); United States v. Georgia-Pacific Co.,* 421 F.2d 92, 100-01 (9th Cir. 1970); 4 K. Davis, Administrative Law Treatise §§ 20:1-20:12 (2d ed. 1983). Irrespective, however, as to whether there is a logical basis for the difference between the Department's disciplinary Rules of Practice and the Department's § 8c(15)(A) Rules of Practice, the fact is that nothing in the § 8c(15)(A) Rules of Practice provides for an admission in the case of the Department's failure to file a timely Answer, or failure to have the Answer signed by the proper party. Accordingly, if a proper Answer is not filed on time, the ALJ's only recourse is to cajole the Department into filing a proper Answer.

In addition, the ALJ is not correct in ruling that the government's Answer is defective without the Administrator's signature. The respondent's Appeal Petition (Aug. 29, 1991) has listed a number of reasons why the ALJ is in error on this point (I agree with respondent), some of which are included hereafter.

The applicable rule (7 C.F.R. § 900.52a) does say that "the Administrator shall file an answer," but the rule for amended pleadings does not specify who shall file (7 C.F.R. § 900.52b). In any event, the term "Administrator" is defined as including those delegated to act for the Administrator (7 C.F.R. § 900.51(e)). The rules are silent on who may "sign," and just address who shall "file" the Answer. Even if one assumes that "file" is the equivalent of "sign," the rules nowhere preclude the Departmental attorneys from signing for their client; but, to the contrary, USDA attorneys have clearly delegated authority from the Secretary, through the General Counsel, to represent the Department's position in any 7

U.S.C. § 608c(15)(A) proceeding (see 7 C.F.R. § 2.31(h); 7 C.F.R. § 900.51(e); and 7 C.F.R. § 900.60(b)).

The rules concerning Answers and Amended Answers are no more restrictive than any other pleadings under the Rules of Practice. Briefs are filed by each "party" (7 C.F.R. § 900.64(b)), Petitions and Interim Relief requests by a "handler" (7 C.F.R. §§ 900.52(a), .70(a)) and Answers thereto by the "Administrator" (7 C.F.R. §§ 900.52a(a), .70(c)). *All of these documents in this proceeding were signed by the respective attorney,* but the ALJ did not find any of these defective.

The respondent lists two examples where the Judicial Officer has accepted documents signed only by respondent's attorney (see documents relating to *In re M&R Tomato Distributors, Inc.,* AMA Docket No. No. F&V 965-2 (attached to respondent's Appeal Petition herein (Aug. 29, 1990)); and the Appeal Petition in *In re Farm Fresh, Inc., supra).*

Moreover, the ALJ has not held petitioners to the same standard, allowing petitioners' counsel to do that which the ALJ did not allow respondent—get documents into the proceeding signed, or filed, or executed, solely by the petitioners' attorney.

Curiously, the ALJ in this proceeding *had ordered* respondent's counsel to do exactly that which the ALJ defaulted the USDA attorney for doing. In the ALJ's one-page Order Granting Leave to File Amended Petition (Jan. 31, 1990), the ALJ ordered: "Respondent's counsel may file an answer to the amended petition. . . ." Based upon this, and the Rules of Practice provisions already set forth, it is perplexing that the ALJ defaulted respondent, especially since the petitioners had not raised a pleading defect. This

issue had just been addressed with this same ALJ, in *Farm Fresh, supra,* during the same time period as the pendency of the instant proceeding.

In fact, respondent argues that this same ALJ, *sua sponte,* erroneously raised issues in that § 8c(15)(A) proceeding *(Farm Fresh) which had not been pled by a petitioner,* as follows (Respondent's Appeal Petition at 4-5 (Aug. 29, 1990)):

> In the Initial Decision and Order herein, the Administrative Law Judge found that the Rules of Practice "do not provide that respondent's counsel may execute answers to petitions or answers to amended petitions". (Initial Decision and Order, page 4). Hence, he found that paragraph 11 was "admitted by respondent" (*Id.*, page 5) and made findings and conclusions in accord with this ruling (*e.g.*, Finding of Fact 16; Conclusions, pages 47-48). In so ruling, the Judge ignored the recent decision of the Judicial Officer that this same Judge was in error for raising issues in a 15(A) proceeding that had not been plead by the petitioner. *In re Farm Fresh, Inc.*, AMA Docket No. M 106-2, Decision and Order of the Judicial Officer, filed April 12, 1990, pages 52-53.[9] The

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[9] The material from *Farm Fresh* is included again here (see § *II(A), supra)* for convenience of the reader (49 Agric. Dec. at 79-80):

> In addition to disagreeing with the ALJ on the merits of the Notice of Hearing issue, I disagree with the ALJ on procedural grounds. That is, I believe that it was inappropriate for the ALJ to hold that the Notice of Hearing (and therefore the amendatory order) was invalid on the basis of a sentence in the Notice of Hearing not relied upon by the petitioner. It should be noted that this is not the typical proceeding brought before the ALJs whereby the Department is the complainant, and the ALJ might appropriately note *sua sponte* a ground of *defense* not noticed by the respondent's counsel. Rather, a § 8c(15)(A) proceeding is instituted by a private party, who is responsible for framing the issues. Under

Judge claims said introduction is inapposite in the instant proceeding since the petition and amended petition necessarily had already been filed before the amended answer. (Initial Decision and Order, nt. 5). He neglects, however, to note that petitioners could have filed a further amended petition (7 C.F.R. 900.52b), or an appropriate motion to strike the amended answer or to issue a default ruling on this point (7 C.F.R. 900.59), if they wished to pursue this contention. Petitioners did neither. In fact, they totally ignored this supposed defect when filing their further motions and briefs (petitioners' documents filed April 20, 1990, and May 1, 1990). Hence, petitioners waived any pleading defect and the Judge was in error in raising this issue.

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§ 8c(15)(A) of the Act (7 U.S.C. § 608c(15)(A)), only a handler may file "a written petition" challenging an order, or any provision thereof, after which the handler shall be given opportunity for a hearing "upon such petition, in accordance with regulations made by the Secretary," and with a ruling made "upon the prayer of such petition. . . ." Neither the statute nor the Rules of Practice authorize an ALJ or the Judicial Officer to challenge an order or a provision thereof upon a basis not raised by the handler. The Rules of Practice require the petition to specifically state the "grounds" for the challenge (7 C.F.R. § 900.52(b)(4)), limit the evidentiary record to matters relevant and material to those grounds (7 C.F.R. § 900.60(d)), and require the ALJ to base his decision on that record (7 C.F.R. § 900.64(c)).

Even though the petitioner contested the adequacy of the Notice of Hearing in its petition, petitioner did not rely on the ground relied upon by the ALJ in holding that the Notice of Hearing was inadequate. Accordingly, I believe that it was error for the ALJ to raise *sua sponte* the issue as to whether the sentence limiting the receipt of evidence "to the economic and marketing conditions which relate to the location adjustment provisions of the proposed merged and expanded Southwest Plains marketing area" precluded the receipt of evidence on the issue as to whether Lincoln County should be placed in Zone I.

Once again, I find the ALJ to be in error for raising issues *sua sponte* not pled by petitioners in the § 8c(15)(A) Petition. In addition, the § 8c(15)(A) Rules of Practice do not invalidate an Answer signed by a Department attorney.[10] Moreover, the § 8c(15)(A) Rules of Practice do not provide for a default (admission of facts) even if the Department fails to file a timely Answer.

B. The ALJ's Reliance Upon the Amended Petition Was Error for the Reason, *Inter Alia*, That the Purported Facts Therein Occurred After the Rulemaking Record Was Closed.

On January 29, 1990, petitioners sought leave to amend their Petition and simultaneously filed a brief in support thereof. The ALJ granted this motion by Order dated January 31, 1990, and also ordered that "[r]espondent's counsel may

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[10] By way of analogy, the Federal Rules of Civil Procedure expressly authorize (and require) an attorney of record to sign a pleading (if the party is represented by an attorney), and there is no requirement that the party also sign the pleading (FED. R. Civ. P. 11). Of course, it is widely and generally understood that the administrative process, while similar to a court proceeding, is not as formal. For instance, responsible hearsay evidence is routinely admitted in administrative fora. Moreover, I have routinely held that the technicalities of court pleading are not applicable in the Department's administrative process *(see In re Boswell,* 49 Agric. Dec. 210, 211-14 (1990); *In re Hickey,* 47 Agric. Dec. 840, 850-51 nn. 6 & 7 (1988), *aff'd,* 878 F.2d 385 (9th Cir. 1989) (text in WESTLAW), *reprinted in* 48 Agric. Dec. 107 (1989); *In re White,* 47 Agric. Dec. 229, 264-65 (1988), *aff'd per curiam,* 865 F.2d 262 (6th Cir. 1988) (text in WESTLAW); *In re Collins,* 46 Agric. Dec. 217, 232-33 (1987); *In re H&J Brokerage, Inc.*, 45 Agric. Dec. 1154, 1197-98 (1986); *In re Saylor,* 44 Agric. Dec. 2238, 2480-81 (1985)). There is no basis for reading into the § 8c(15)(A) Rules of Practice a technicality not even required in a federal court proceeding.

file answer to the amended petition no later than March 2, 1990." The amendment read, *in toto,* as follows:

> 11. On September 21, 1989, after the issuance of the final decision the Secretary of Agriculture, by counsel, in argument to the United States District Court for the Western District of Michigan, revealed that important considerations of the Secretary of Agriculture in making the subject location adjustment amendments were: (a) a very small percentage of milk received by Frigo is used for Class I purposes, and virtually all of Frigo's milk is used for Class III, or cheese, (b) the purpose of the marketing order and the Act is to assure supplies for Class I use, (c) that Frigo, while not supplying the fluid market, had drawn significant sums of money from the pool in order to pay producers, and (d) the action of the Secretary reducing blend prices for milk delivered to the Frigo plants was intended to correct the foregoing situation. The reasons advanced by the Secretary to the District Court, which related the price of milk which should be received by Frigo producer patrons to the use made of Frigo milk receipts, is expressly prohibited by the Agricultural Marketing Agreement Act and such rationale serving any part as the basis for the Secretary's decision renders the decision unlawful.

Thereafter, in what appears to be a strict observance of the ALJ's January 31, 1990, Order, and which does not violate the § 8c(15)(A) Rules of Practice (§ IV(A), *supra),* respondent filed its Answer on March 2, 1990, which reads in its entirety, as follows:

ANSWER TO AMENDMENT TO PETITION

> Respondent, the Administrator of the Agricultural Marketing Service of the United States Department of

Agriculture, answers the amendment to the above-titled petition, requested on January 29, 1990, and granted on January 31, 1990, as follows:

> 11. Respondent denies the allegations in paragraph 11 of the amended petition except to admit that counsel for the Secretary appeared and argued in the United States District Court for the Western District of Michigan on September 21, 1989. Respondent further answers that the formal rulemaking actions challenged in this proceeding can be judged only on the basis of the formal rulemaking record and, thus, the allegations in paragraph 11 of the amended petition are irrelevant and immaterial to the issues in this proceeding and no evidentiary material may be admitted in this proceeding regarding said allegations.

As explained in the immediately preceding section (IV(A)), it was error for the ALJ to default respondent's Answer, with the result that the ALJ deems respondent to have admitted the allegations of the Amended Petition's paragraph 11. If I understand correctly the ALJ's analysis here, the ALJ would, on the one hand, default respondent on paragraph 11 for the reason that a government attorney cannot *sign* for the Administrator, but would then, on the other band, take a government attorney's argument in a separate proceeding in open court on a remote point (irreparable injury to petitioners under legal requirements for a preliminary injunction) as a basis to retroactively render unlawful the Secretary's reasoned decision in a formal rulemaking whose record has been closed. The inconsistency of the ALJ's position is clear. An ALJ in an administrative proceeding does not, and should not, possess the *ex parte* power to decide when that ALJ will allow the government attorney to bind the Department, and when the ALJ will not.

Moreover, the ALJ's underlying acceptance of the proposition that post-rulemaking "facts" may be put forward in a way to attack successfully a formal rulemaking *after the record is closed* is incorrect. Even petitioners understand that the rulemaking may not be successfully attacked with *post hoc* evidence and rationale, and petitioners clearly stated this in their initial filing in this proceeding (Petitioners' Brief on the Merits at 8 (Oct. 31, 1989), as follows (emphasis added):

> Because this proceeding involves review of a fully-developed rulemaking record and decision, and *does not allow for de novo hearing,* there is no occasion for the submission of proposed findings of fact in the traditional sense because *review must be based upon the factual record adduced in the rulemaking proceeding, and the adequacy of factual findings and reasons in the rulemaking decision; post-hoc evidence and rationale are not permitted. United States v. Mills,* 315 F.2d 828, 836 (4th Cir.), *cert. denied,* 375 U.S. 818 (1963); *In re County Line Cheese Co.,* 44 Agric. Dec. 63, 113 (1985), *aff'd sub nom. County Line Cheese Co. v. Lyng,* 823 F.2d 1127 (7th Cir. 1987) (citing *Burlington Truck Lines v. United States,* 371 U.S. 156, 168 (1962) ["courts may not accept appellate counsel's *post hoc* rationalizations for agency action"])[11]

The substantial-evidence test must be applied only to the facts actually before the Secretary, upon which facts the rulemaking decision was made. Consequently, the purported facts contained in the related Federal court proceeding, *even if the government attorney stipulated their existence,* would constitute a nullity *vis-a-vis* the formal rulemaking at issue

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[11] *Accord Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402, 419 (1971).

here. Of course, the government attorney properly denied the allegations of paragraph 11, in the government's Answer (Mar. 2, 1990).

Respondent advances a number of cogent reasons why the ALJ's reliance on the material in the Amended Petition is faulty (Respondent's Answer, *supra,* at 8-11). Petitioners attached some transcript pages (numbered 59-61) to the Amended Petition, but these pages were never offered or received into evidence. The ALJ could have attempted to admit them *ex parte,* or have attempted to take official notice of them, but respondent would have had the right to object, in either instance. See 7 C.F.R. § 900.60(d)(2) and (d)(7).

As it happened, the respondent's Request for Clarification and Revised Briefing Schedule (Mar. 2, 1990), which sought to address this issue, was not really addressed by the ALJ; rather, the ALJ just proceeded as if the transcript pages were admitted.[12] This approach prevented the respondent from addressing the legal issues, and also circumvented any procedural challenges, as well. The transcript pages, for instance, were not from a *corrected* federal court transcript. Moreover, petitioners took out of context (from a USDA attorney's long oral argument about irreparable injury) some statements about petitioners' operations to make a point about the Secretary's purported thought processes in deciding the earlier rulemaking.

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[12] On March 6, 1990, the ALJ issued his Order Denying Request for Revised Briefing Schedule, in which the ALJ refused to allow respondent additional time to respond to what amounts to an immensely significant change in petitioners' legal posture. That is, after stating in Petitioners' Brief on the Merits at 8 (Oct. 31, 1989) that *post hoc* rationale is not permitted, the Amended Petition submits *post hoc* rationale.

The ALJ's treatment of the Amended Petition creates a situation where the ALJ is relying on extraneous material--not litigated in relation to this proceeding--which deprives respondent of procedural due process, while, at the same time, introduces *post hoc* rationale attacking a closed rulemaking proceeding. An examination of petitioners' arguments supporting the Amended Petition reveals that petitioners find what petitioners call "curiously dichotomous logic" when reading "between the lines of the Secretary's decision." This is nothing more than second-guessing the Secretary's decision, substituting what petitioners think the Secretary should have done, to give petitioners a better position. This is not what Congress had in mind (see § III, *supra).* Specifically, petitioners argue that the Secretary based his decision on the prohibited factor of the use to which the milk was put by the handler in making price (location) adjustments, citing *Zuber v. Allen,* 402 F.2d 660 (D.C. Cir.), *aff'd,* 396 U.S. 168 (1969); and *Blair v. Freeman,* 370 F.2d 229 (D.C. Cir. 1966) (Petitioners' Brief filed Jan. 29, 1990, at 3-5). However, in both of these cases, the Court's decision relied exclusively on the rulemaking record before the Secretary, where the Secretary quite explicitly set forth the reasons for the decision. The cases do not support petitioners' use of *post hoc* rationale. Moreover, I find that these cases, as cited by petitioners, do not stand for the proposition (advanced by petitioners) (Petitioners' Brief filed Jan. 29, 1990, at 3) that the courts require a reading between the lines of the Secretary's decision. Quite the contrary, both cases look directly to the exact words of the Secretary's decisions, and the rulemaking records for substantial evidence to support the Secretary's decisions. In *Zuber and Blair,* the courts found that the Secretary had incorrectly used the location adjustment to justify a nearby differential, based upon farm location, and not upon the

location where milk was delivered, as required by the Act.[13] We have no such situation herein.

In summary, it was error for the ALJ to default respondent's Answer to the Amended Petition. But, the allegations, in any event, would still be a nullity, because the Amended Petition is all *post hoc* rationale, even though lifted from a later, related court proceeding transcript. The Secretary's decision must succeed or fail on court review by what exists inside the four corners of the rulemaking record. We must look to the reasoning stated in the Secretary's decision, and if there is substantial evidence to support that decision, and it is authorized by the Act, and has a rational basis, it must be affirmed, as is shown below.

V. The Secretary's Rulemaking Amendments Were Statutorily-Authorized Location Adjustments Under 7 U.S.C. § 608c(5), and Were Not Price Changes Under 7 U.S.C. § 608c(18), as Erroneously Held by the ALJ.

The Act specifically provides for location adjustments to the uniform minimum class prices paid by handlers for milk (7 U.S.C. § 608c(5)(A)), and to the blend prices paid to producers (7 U.S.C. § 608c(5)(B)(ii)), and the Secretary specifically based the rulemaking amendments involved here on the proper statutory authority (7 U.S.C. § 608c(5). However, the bulk of the ALJ's *Discussion* (Initial Decision at 21-43, 49-50), entitled "Pricing by Location" and "Conclusion," erroneously substitutes the ALJ's theory that

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[13] In *Zuber*, at the Supreme Court level, the Government abandoned its argument that the nearby differential was a location adjustment (396 U.S. at 180). Hence the Supreme Court's *Zuber* decision, discussed in § V, *infra*, is dicta with respect to location adjustments.

the adjustments to price herein should have been accomplished under 7 U.S.C. § 608c(18)); and, moreover (as the ALJ opines), even if the Secretary had used § 8c(18), it would not have mattered to the ALJ's theory (to wit, that these Order 40 price adjustments are illegal) because the ALJ found that § 8c(18) requires a supply-and-demand analysis not done by the Secretary (see, e.g., Initial Decision at 40-43).

The ALJ's theory is so lengthy and completely erroneous that a detailed refutation of all of his points is unnecessary and would only burden this proceeding. The Secretary's decision must stand or fall on what is contained in the four corners of the rulemaking decision document (reprinted, *supra).* An examination of the rulemaking decision reveals that the Secretary specifically addressed this distinction between changes in the Class I differential under § 8c(18), on the one hand, and pricing zones (location adjustments) under § 8c(5), on the other. The Secretary specifically rejected the § 8c(18) approach because the Secretary's rulemaking decision only changes location adjustments authorized by § 8c(5), as follows (54 Fed. Reg. at 26,774-75, *supra)* (emphasis added):

> Exceptions to the recommended decision on this issue were filed by Kraft and Lansing Dairy. Kraft also asked that the hearing be reopened because of the closing of the Kraft plant at Clare, Michigan, and because of what they perceive as a change in the Department's policy on Class I pricing subsequent to the close of the hearing.
>
> Kraft in its exceptions, has characterized the Secretary's decision to reduce the minus location adjustments in several zones as raising the minimum Class I price. Kraft cites the statutory language of Section 8c(18) of the Agricultural Marketing Agreement Act of 1937 (Act). In Kraft's view, the Act permits the Secretary to raise milk prices in a market or at a location

when the current price is inadequate to attract "a sufficient quantity of pure and wholesome milk" to meet fluid needs. Section 8c(18), in their view, does not permit a minimum price increase where uncontroverted evidence establishes, and the Secretary finds, that the current supply is more than adequate to meet fluid needs.

The Class I differential, which is established at the base or "zero" zone, is $1.75, and *would not be changed. Section 8c(18) is the authority for the Secretary to change the Class I differential if supply and demand warrants a change in order to increase or decrease milk production. The authority for the Secretary to provide for pricing zones (location adjustments) in an order is found in Section 8c(5)(A) of the Act. What this decision does is to reduce location adjustments* at various locations inside the lower portion of Michigan, but outside the Detroit area.[14]

Since the ALJ found (erroneously) the Secretary's use of § 8c(5) to be in derogation of § 8c(18), it is necessary to state specifically what 7 U.S.C. § 608c(5) and 7 U.S.C. § 608c(18) provide. The Act expressly authorizes location adjustments to the uniform minimum class prices paid by handlers for milk (7 U.S.C. § 608c(5)(A)(3)), and to the blend price paid to

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[14] Petitioners argue that the Secretary's General Finding at the end of his Final Decision, stating that "minimum prices ... as hereby proposed to be amended, are such prices as will reflect [§ 8c(18) statutory] factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest" (54 Fed. Reg. at 26,779), is inconsistent with his "earlier disclaimer concerning reliance on Section 8c(18)" (Petitioners' Brief on the Merits filed Oct. 31, 1989, at 45). The General Finding is boilerplate included in all milk decisions, and if there is any inconsistency, the specific disclaimer in the language quoted immediately above prevails.

producers (7 U.S.C. § 608c(5)(B)(ii)(c)), based merely on the "locations at which delivery of such milk" is made. Specifically, the Act provides (7 U.S.C. § 608c(5)(A), (B) (emphasis added)):

(5) Milk and its products; terms and conditions of orders

In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section) no others:

(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and *fixing*, or providing a method for fixing, *minimum prices for each such use classification which all handlers shall pay* [i.e., Class prices), and the time when payments shall be made, for milk purchased from producers or associations of producers. *Such prices shall be uniform* as to all handlers, *subject only to adjustments for* (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and *(3) the locations at which delivery of such milk*, or any use classification thereof, *is made to such handlers*....

(B) Providing:

....

(ii) for the payment to all producers and associations of producers delivering milk to all handlers of *uniform prices* for all milk so delivered, irrespective of the uses made of such milk by the

individual handler to whom it is delivered [i.e., blend prices];

subject, in either case, only *to adjustments for* (a) volume, market, and production differentials customarily applied by the handlers subject to such order, (b) the grade or quality of the milk delivered, (c) *the locations at which delivery of such milk is made* ....

Section 8c(18) of the Act provides (7 U.S.C. §608c(18) (emphasis added)):

(18) Milk prices

The Secretary of Agriculture, *prior to prescribing any term* in any marketing agreement or order, or amendment thereto, relating to milk or its products, *if such term is to fix minimum prices to be paid to producers or* associations of producers [i.e., Class or blend prices], *or prior to modifying the price fixed in any such term,* shall ascertain the parity prices of such commodities. The prices which it is declared to be the policy of Congress to establish in section 602 of this title shall for the purposes of such agreement, order, or amendment, be adjusted to reflect the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk or its products in the marketing area to which the contemplated marketing agreement, order, or amendment relates. Whenever the Secretary finds, upon the basis of the evidence adduced at the hearing required by section 608b of this title or this section, as the case may be, that the parity prices of such commodities are not reasonable in view of the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk and its products in the marketing area to which the contemplated

> agreement, order, or amendment relates, *he shall fix such prices* as he finds will reflect such factors, insure a sufficient quantity of pure and wholesome milk to meet current needs and further to assure a level of farm income adequate to maintain productive capacity sufficient to meet anticipated future needs, and be in the public interest. *Thereafter, as the Secretary finds necessary on account of changed circumstances, he shall,* after due notice and opportunity for hearing, *make adjustments in such prices.*

Under the plain terms of § 8c(5), location adjustments are *adjustments* (made under the authority of § 8c(5)) to the "minimum prices to be paid" (i.e., the Class prices and blend prices) to producers, referred to in § 8c(18). Specifically, location adjustments are not the "minimum prices to be paid" to producers, referred to in § 8C(18). Rather, they are authorized *adjustments* to such minimum prices, which adjustments are authorized by § 8c(5). The uniform minimum prices paid by handlers under Order 40 (like almost all of the other Federal Milk Orders) are the Class I, Class II, and Class III prices (7 C.F.R. § 1040.50). (As typical, the location adjustments applicable to handlers under Order 40 apply only to the Class I price; not to the Class II or Class III prices (7 C.F.R. § 1040.52(a)).[15] For over 50 years, the Secretary has used the authority in § 8c(5)—not the authority in § 8c(18)—to promulgate (and amend) location adjustments to the uniform minimum prices (Class prices and blend prices), based on the locations at which delivery of milk is made. *See, e.g., In re Borden Inc.,* 46 Agric. Dec. 1315, 1391-92, slip op. at 90-91 (1987), *aff'd,* No. H-88-1863 (S.D. Tex.

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[15] The New York-New Jersey Order is the only Order providing for handler location adjustments for Classes in addition to Class I (7 C.F.R. § 1002.51).

Feb., 13, 1990); Secretary's Rulemaking Decision herein, 54 Fed. Reg. at 26,774-75.

Under the plain provisions of § 8c(18), the Secretary is to make parity determinations and findings, and use them in determining "prices," in two circumstances. The first circumstance is "prior to prescribing any term ..., *if such term* is to fix minimum prices to be paid to producers" (7 U.S.C. § 608c(18) (emphasis added)), i.e., prior to fixing Class prices or blend prices. The second circumstance is "prior to modifying the price fixed in any *such term*" (7 U.S.C. § 608c(18) (emphasis added)), i.e., prior to modifying the Class prices or blend prices. Section 8c(18) expressly requires the Secretary to "make adjustments in *such prices,*" i.e., in the Class prices and blend prices, "on account of changed circumstances" (7 U.S.C. § 608c(18) (emphasis added)).

As shown above, location adjustments are not the "minimum prices to be paid to producers," referred to in § 8c(18), but, rather, are *adjustments* (under § 8c(5)) to such minimum prices. Hence, § 8c(18) is, by its express terms, not applicable to location adjustments.

The legislative history of the Agricultural Marketing Agreement Act of 1937 is consistent with the foregoing statutory analysis. Section 8c(5) of the Act was added to the Agricultural Adjustment Act in 1935 (Act of Aug. 24, 1935, Pub. L. No. 320, § 5, 49 Stat. 750, 754-57). Section 8c(18) was added 2 years later, when certain provisions of the Agricultural Adjustment Act were reenacted (including § 8c(5)), amended, and supplemented *(inter alia, by* § 8c(18) (Act of June 3, 1937, Pub. L. No. 137, § 2(f), 50 Stat. 246, 247)). The House Report states in its entirety, insofar as relevant here (H.R. Rep. No. 468, 75th Cong. 1st Sess. 3 (1937) (emphasis added)):

Section 2(f) of the bill adds to section 8(c) of the Agricultural Adjustment Act two new subsections. The first deals with milk prices. Milk is the only commodity for which producer prices for interstate milk may be fixed by the Secretary of Agriculture through orders under the Agricultural Adjustment Act. The necessity for price regulation in the case of milk has also been recognized by many States which have established milk boards to fix producer prices for intrastate milk, and the validity of such State regulation has been upheld by the Supreme Court *(Nebbia v. New York* (1934), 291 U.S. 502). Marketing agreements and orders for milk ordinarily involve pooling and price plans which, to be effective, must continue with the up and down swings of economic factors which relate to price. The proposed amendment recognizes this, and provides that if the Secretary finds that the national parity price for milk does not adequately reflect the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk in the marketing area to which the marketing agreement or order relates, he shall fix such prices as will reflect such factors, insure a sufficient quantity of pure wholesome milk, and be in the public interest. The proposed amendment further provides that *as the Secretary finds necessary on account of changed circumstances, he shall make adjustments in prices. Such adjustments are to be made in accordance with the same standards as are provided for the initial fixing of prices under this subsection.*

Similarly, the Senate Report states in its entirety, insofar as relevant here (S. Rep. No. 565, 75th Cong., 1st Sess. 3 (1937) (emphasis added)):

Subsection (18) added to section 8(c) of the Agricultural Adjustment Act by section 2(f) of the bill

provides a more workable standard for the guidance of the Secretary in fixing milk prices in an order issued for a particular marketing area. Milk is the only agricultural commodity for which prices are permitted to be fixed in orders issued under the Agricultural Adjustment Act, and the Secretary is required to use the purchasing power of milk as his guide in the issuance of orders. This provision of the bill requires the Secretary, if an order or marketing agreement is to include fixed prices, to ascertain the prices which will be equivalent in purchasing power to prices of milk in the base period according to sections 2 and 8e of the Agricultural Adjustment Act. In addition, if he finds these ascertained prices are not reasonable in view of the local price of feeds, the available supply of feeds and other economic conditions which affect the supply of and the demand for milk in a particular marketing area, the Secretary shall fix such prices as will reflect these conditions, insure a sufficient quantity of pure and wholesome milk, and be in the public interest. The peculiar nature of milk as a commodity and the power of requesting prices of this commodity have been set forth by the Supreme Court in its decision in the case of *Nebbia v. New York* (1934), 291 U.S. 502.

The reasoning there set forth can be applied with equal force to the regulation of interstate commerce in milk. The intricate problems of the milk industry as described in the above cited opinion, explain the use of the several pooling and price plans authorized for inclusion in milk orders. *Their effectiveness depends* upon their adaptability to conditions affecting each marketing area and *upon their adjustment from time to time to meet changing conditions. The Secretary is to use the same standard in adjusting prices as is to be used in*

the *fixing of prices initially in the regulation of any marketing area.*

There is nothing in either report to suggest that the § 8c(18) parity determinations and findings must be used in promulgating or amending adjustments under § 8c(5), e.g., location adjustments, to Class prices and bend prices. The reports indicate that the "adjustments" referred to in § 8c(18) are "on account of changed circumstances" (House Report), i.e., "to meet changing conditions" (Senate Report). Nothing in the reports suggests that § 8c(18) refers to the adjustments under § 8c(5) to the Class prices or blend prices, because of "locations," "grade," or "volume, market, and production differentials."

Both reports state that when the Secretary makes adjustments in prices under § 8c(18) because of "changed circumstances" (House Report) or "changing conditions" (Senate Report), *the Secretary is to use the same standards as are to be used in the fixing of prices initially under § 8c(18).* The only support in the statutory language for that statement in the reports appears in the first sentence of § 8c(18), i.e., that the Secretary, "prior to *prescribing* any term ..., if such term is to fix minimum prices to be paid to producers or prior to *modifying* the price fixed in any such term," shall make the parity determinations and findings referred to in § 8c(18). (The last sentence of § 8c(18) merely requires the Secretary to make adjustments in "such prices" on "account of changed circumstances," without stating the standards.) The reports thus make plain what the express language of § 8c(18) suggests, viz., that when the Secretary is fixing or modifying (i.e., amending or adjusting *because of changed circumstances)* the "minimum prices to be paid to producers" (i.e., the Class prices or blend prices), the Secretary must make the § 8c(18) analysis and determinations. However, nothing in the language of § 8c(18) or its legislative history

supports the ALJ's view that a § 8c(18) analysis must be made when the Secretary is promulgating or amending location adjustments under § 8c(5).

The ALJ apparently concluded that the location adjustment changes involved here are subject to a § 8c(18) analysis because he determined that under these particular amendments, "milk prices are changed" (Initial Decision at 34; and see particularly *id.* at 30-34 & n.31). However, *every* location adjustment is an *adjustment to* the milk prices paid to producers. That is what a location adjustment does. It adjusts the minimum milk prices that otherwise would be paid. The location adjustment provisions here are no different, in this respect, than every other location adjustment provision.

For over 50 years, it has been the contemporaneous and settled construction of the Act that changes in Class prices are subject to a § 8c(18) analysis, but that changes in location adjustments are not subject to a § 8c(18) analysis. That 50-year practice comports with the statute, and is entitled to significant weight.[16] Depending on the facts relevant to a

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[16] *Allen M. Campbell Co. Gen. Contractors, Inc. v. Lloyd Wood Constr. Co.*, 446 F.2d 261, 265 (5th Cir. 1971); *Lawson Milk Co. v. Freeman*, 358 F.2d 647, 650 (6th Cir. 1966). See, also, *Udall v. Tallman*, 380 U.S. 1, 16-17 (1965); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413-14 (1945); *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 143 n. 6 (1940); *Norwegian Nitrogen Prods. Co. v. United States*, 288 U.S. 294, 335 (1933); *United Truck Lines, Inc. v. ICC*, 189 F.2d 816, 817 (9th Cir.), *cert. denied*, 342 U.S. 830 (1951); *L. Gillarde Co. v. Joseph Martinelli & Co.*, 169 F.2d 60, 60-61 (1st Cir.), *cert. denied*, 335 U.S. 885 (1948); *Armstrong Co. v. Walling*, 161 F.2d 515, 517 (1st Cir. 1947); *Superior Packing Co. v. Porter*, 156 F.2d 193, 195 (8th Cir.), *cert. denied*, 329 U.S. 788 (1946); *Bowles v. Mannie & Co.*, 155 F.2d 129, 133 (7th Cir.), *cert. denied*, 329 U.S. 736 (1946); *Bowles v. Cudahy Packing Co.*, 154 F.2d 891, 892 (3d Cir. 1946); *In re Yasgur Farms Inc.*, 33 Agric. Dec. 389, 417-18 (1974); *In re Weissglass Gold Seal Dairy Corp.*,

particular location adjustment, some of the same factors that are required to be considered in Class price changes under § 8c(18) may be considered in a location adjustment change under § 8c(5), but there is no statutory requirement that a location adjustment change under § 8c(5) be supported by a § 8c(18) analysis.

The ALJ relies, in part, for support for his theory that location adjustment changes must be supported by the supply and demand analysis required by § 8c(18), on my decision in *In re Borden, Inc.*, 46 Agric. Dec. 1315, 1459, 1461, slip op. at 190-93 (1987), *aff'd,* No. H-88-1863 (S.D. Tex. Feb. 13, 1990). The *Borden* decision, which is a recent and comprehensive discussion of all aspects of location adjustments, is attached as an Appendix to this decision.* The entire decision should be read for a full understanding of location adjustments. Only a few references will be made here to some *of Borden's* key points. I did not hold in *Borden* that location adjustments must be justified by a § 8c(18) analysis. I expressly held that the Secretary's location adjustment authority is under § 8c(5), e.g. (46 Agric. Dec. at 1457; slip op. at 187):

> Furthermore, the first sentence of § 8c(5) of the Act expressly states that the Secretary is authorized to include in milk orders the "following term and conditions, and (except as provided in subsection (7) of this section [which admittedly is irrelevant here] no others" (7 U.S.C. § 608c(5)). Hence, unless the Secretary has express statutory authority in § 8c(5) of the Act to increase the

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32 Agric. Dec. 1004, 1055, *aff'd,* 369 F. Supp. 632 (S.D.N.Y. 1973).

[* *In re Borden, Inc.*, 46 Agric. Dec. 1315 (1987), has been omitted from the Appendix to this Petition for a Writ of Certiorari.]

location adjustment at issue here, he does not acquire that authority under the statement of policy in § 2(4) of the Act. Conversely, if the Secretary has statutory authority

to increase the location adjustment under the adjustment provisions of 7 U.S.C. § 608c(5)(A), which he does (§ *III(D), supra),* that authority would not be decreased in any manner if inequities among producers and handlers did not constitute disorderly marketing conditions.

The ALJ also finds support for his erroneous theory--that location adjustment changes must be supported by § 8c(18) supply and demand analyses--in the March 1972 report of the Milk Pricing Advisory Committee referred to in *Borden* (46 Agric. Dec. at 1416; slip op. at 127). The ALJ states (Initial Decision at 34-35) (emphasis added):

> It is concluded that the location adjustments addressed in this case are cost-based pricing classifications required in the marketing of milk, authorized by the Act at 7 U.S.C.A. § 608c(5)(A)(3), primarily based on transportation variables, and on the relationships of the *economic benefit exchange between the seller-producers and the buyer-handlers.*
>
> *It then remains to discover the proper process by which milk prices are changed.*[31]

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[31]The Milk Pricing Advisory Committee, recognized in *Borden, Inc., et al.*, 46 Agric. Dec. at 1410, 1416 as a body of expert economists employed by the Department of Agriculture, in its published report to the Assistant Secretary, Milk Pricing Advisory Comm., U.S. Dep't of Agric., Milk Pricing Policy & Procedures--Part I, The

Milk Pricing Problem, 6 (Mar. 1972) (referred to as Advisory Comm. Report), stated:

> Pricing objectives involve an application of general statutory language such as orderly marketing, public interest, adequate supply, parity prices, and the general statutory objectives implied therein to the problem of establishing class prices for milk. *In addition, the Act provides specific guidance for the establishment of milk prices in Section 8c(18). General objectives must therefore be interpreted in light of this more specific language.*

The committee's reference to the Act's specific guidance for the establishment of milk prices is to 7 U.S.C.A. § 608c(18).

What the ALJ fails to realize is that the Committee's report, quoted above in the ALJ's note 31, deals only with Class prices, particularly Class I prices, and their relation to the price support program. There is not one word in the report concerning location adjustments. Hence the ALJ's reliance on the report is misplaced.

Petitioners' objections—which were adopted by the ALJ—to the statutory authority were that the challenged location adjustments were adopted *for purposes not authorized by the Act*. The statute, however, imposes no restriction on the purposes for which location adjustments are made, literally requiring only a showing of a difference "in location at which delivery of such milk is made" (see § 608c(5)(A)(3), (B)(ii)(c), *supra*). (The courts have, however, generally required that location adjustments reflect the location value of milk, relative to the base price *(Borden,* 46 Agric. Dec. at 1392 n.11; slip op. at 92)). In particular, petitioners and the ALJ (see Initial Decision at 44-45) rely on dicta in *Zuber v.*

Allen, 396 U.S. 168, 183-84 (1969),[17] in which the Court said that location adjustments "compensate or reward the producer for providing an economic service of benefit to the handler." The ALJ concludes (Initial Decision at 45):

> In this matter, petitioners Lansing and Liberty contend, [footnote omitted) and by their arguments have established, that since the Secretary has found balanced supply and consumption in Zone I "plenty" of milk in Zone II, and self-sufficiency in Zone III (Finding 17) there is no reason to compensate producers for providing transportation services to handlers in areas where milk is not needed. Hence, there is no economic benefit to these two handlers, and pursuant to *Zuber,* the amending adjustments do not have legality.

That conclusion overlooks the many different considerations that can be used to justify location differentials. The Supreme Court's dicta in *Zuber* (see note 13, *supra),* that location adjustments "compensate or reward the producer for providing an economic service of benefit to the handler" (396 U.S. at 183-84), is not meant to be all inclusive. If it were, all negative location adjustments, which are clearly authorized by the Act, would be unlawful. Negative location adjustments, such as are involved here, do not *compensate* producers for performing a service of benefit to the handler. Rather, they *take away compensation* from producers, on the grounds that the producers have not done as much service for the benefit of handlers as was done by producers delivering milk to the base zone. The handlers subject to such negative location adjustments pay less for their Class I milk than handlers in the base zone.

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[17] See note 13, *supra.*

Borden explains that a location adjustment may be based on the "economic loss to the handler paying a lower price," in addition to being based on "economic benefit to the handler paying a higher price" (56 Agric. Dec. at 1392 n.11; slip op. at 92). Specifically, *Borden* explains (56 Agric. Dec. at 1393-94; slip op. at 93-94):

> The legislative history makes it clear that the location adjustment is based on the fact that the value of milk depends, in part, on the location at which it is delivered. Specifically, the legislative history refers to adjustments for differences in the transportation costs from (1) the place at which delivery is made to the handler (e.g., a country supply plant) to (2) the distributing or processing plant (located near the consumption center). This shows that Congress recognized that milk delivered to a handler's plant located near a consumption center is more valuable to the handler than milk delivered to a distant receiving plant, where the handler will have to incur the additional expense of transporting the milk to the consumption center.
>
> Mechanically, such a difference in value could be recognized in a milk order (i) by a plus location adjustment, i.e., by making the base point (where handlers pay the Class I price) at the farthest point at which milk is received, and having a plus location adjustment for milk delivered at plants closer to the consumption center, (ii) by a minus location adjustment, i.e., by making the base point at the consumption center, and having a minus location adjustment for milk delivered at more distant points, or (iii) by a combination of plus and minus location adjustments, such as were included in the New York milk order, referred to in § II, *supra*. Each of the three methods can compensate producers, and

charge handlers, based on the location value of the milk delivered to the handler.

The issue here is whether the negative location adjustments properly reflect the decreased value of the milk delivered to plants outside of the base zone, as compared to the value of milk delivered to plants in the base zone.

Borden demonstrates that location adjustments can be adopted for any of the broad objectives of the Act, e.g., orderly marketing conditions; ensuring an adequate supply of fluid milk; uniformity as to producers or handlers; location value of milk; increased hauling costs; or a variety of circumstances (id. at 1395-1406; slip op. at 96-114). *Borden* contains an exhaustive analysis of the pertinent case law (id. at 1468-1511; slip op. at 204-70) supporting the Secretary's flexible power in determining location adjustments. *Borden* also examines the legislative history of the Act, which supports the Secretary's ability to fashion location adjustments for the greatest number Of reasons (*id.* at 1392-94; slip op. at 91-95; see also *id.* at 1399-1403; slip op. at 101-08). Therefore, petitioner's arguments, and the ALJ's conclusions, both of which characterize the Secretary's power to make location adjustments as being very limited, are not correct.

That part of the Secretary's decision challenged by petitioner makes two kinds of changes in the location adjustments: a change in the location adjustment in *zones* established mainly in the marketing area; and an increase in the *mileage* location adjustment rate for plants outside the zones. For both of these location adjustments, the Secretary's decision must be upheld if the Secretary has a rational basis for the changes under the Act, and there is substantial evidence on the record to support the changes.

The Secretary's decision, on changing zones and changing the amount of the negative location adjustments within the zones, recognized that the zone system's primary purpose "continues to be to provide an incentive to move milk from the production area to the consumption center" (54 Fed. Reg. at 26,775, *supra)*. However, since 1977, when the location adjustments were last amended, numerous changes in the market have occurred which require less incentive to move milk, and thus changes in the location adjustment zones, with lower negative location adjustments, will "better reflect the need to move less milk under current market conditions" (*id.* at 26,772). The Secretary's decision (*id.* at 26,775) involves the authority under the Act for "increasing or decreasing the location adjustment in a market to reflect changes in the relationship between production area and consumption areas." The *Borden* decision clearly supports this flexible approach, as discussed, *supra*. If the factual statements concerning the location adjustments in the zones are supported by substantial evidence, and the reasoning is rational, then the zone location adjustments are authorized by the Act.

The other challenged location adjustment is the mileage location adjustment rate for plants outside the zones (i.e., generally outside the marketing area). Plant location adjustments are authorized to require handlers to pay the location value of their milk at delivery, and to reflect increased hauling costs. The Secretary's decision found that the current mileage rate "seriously overstates the value of milk" at the locations in question and is seriously inadequate to reflect hauling costs incurred under current conditions (Secretary's Final Decision at 26,777, *supra)*.

The challenged amendments, as seen above, merely change the numbers and zone boundaries of Order 40, and certainly raise no new questions of statutory authority. Thus, if the two amendments are supported by substantial evidence

on the record, and the reasoning is rational, then the Secretary's decision must be affirmed, and the Petition dismissed. I find that the Initial Decision, insofar as it completely misconstrued and misapplied the statutory authority underlying the Order 40 location adjustments made by the Secretary, is incorrect, and must be reversed.

VI. There Is Substantial Record Evidence and a Rational Basis Both for the Revised Location Adjustment Zones and for the Mileage Location Adjustment Rate for Plants Outside the Zones.

Since the Secretary's decision evinces a statutory basis for the location adjustments for zones and mileage (see § *V, supra),* it must be affirmed if it is rational and there is substantial evidence in support thereof on the rulemaking record (see § I, *supra).* Although the Secretary's decision summarizes the rationale of all the proponents and opponents, it clearly indicates the Secretary's own rationale. It is on the basis of the Secretary's rationale stated in the rulemaking decision that his action must be judged. The Secretary's reasoning is rational, and there is substantial record evidence supporting both the revised location adjustment zones, and changing the amount of the negative location adjustments within the zones, and the mileage location adjustment rate for plants outside the zones.

A. There Is Substantial Record Evidence and a Rational Basis for the Revised Location Adjustment Zones Used in the Marketing Area.

The Secretary found years ago[18] that a seven-zone system was required within the marketing area to move fluid milk from the production area to the consumption area. (See Secretary's Findings and Conclusions No. 1, *Changing the location adjustment and direct-delivery differential zones in the order,* pp. 26,769-75, *supra.*) However, in 1989, the Secretary found significant changes in the market since the last location adjustment amendment in 1977 in terms of population distribution, plant closings, and the relationship of production and consumption. He concluded that the resulting need to move less milk warrants fewer zones with a smaller range of location adjustment amounts (id.).

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[18] The Secretary's decision in 1951 with respect to the proposed Order Regulating Handling of Milk in Detroit, Michigan, Marketing Area states that "[f]or more than 30 years a location adjustment has been applied to milk received at country plants for re-shipment to city bottling plants in the Detroit area" (16 Fed. Reg. 4551, 4558 (1951)). When the Detroit Order was expanded to include Milk in Detroit, Michigan, and Central Michigan Marketing Areas (24 Fed. Reg. 10,207, 10,212-13 (1959)), and Milk in Southern Michigan and Muskegon, Michigan, Marketing Areas (30 Fed. Reg. 7903, 7905-09 (1965)), location adjustments continued. In 1973, the present Order was promulgated Regulating the Handling of Milk in Southern Michigan Marketing Area, with seven zones ranging from no adjustment in the base zone, and -3¢ to -15¢ in the other zones, and a 1¢ per 10 miles per cwt. mileage rate outside the zones (38 Fed. Reg. 4649, 4656 (§ 1040.52(a)(1), (2) (1973)). Prior to the amendments at issue here, the location adjustments were last changed in 1977 (42 Fed. Reg. 41,603, 41,604 (1977)), for the reasons stated in the Secretary's decision (42 Fed. Reg. 37,562, 37,562-65 (1977)).

The Secretary found undisputed evidence that since 1977 the marketing area population has been nearly static. However, Class I product sales dropped over 10%, while milk production increased more than 10% (*id.* at 26,773; Tr. 53-59, 92-94; Ex. 5, 9, 10, 12, 13, 15). By 1989, there was much more milk available for fluid milk supply. Between 1976 and 1986, the ultimate consumption area (Detroit) had a 12% population decline and Detroit Class I milk sales plunged by over 35% *(id.* at 26,772; Tr. 55-56; Ex. 9, 15). Additionally, the Secretary noted that two distributing plants shut down in close-in Detroit *(id.)*. The Secretary found that population and milk sales statistics further demonstrate that any slight increase in population and fluid milk sales which occurred in localized areas, all occurred in areas farther out in proposed Zone 1 or in proposed Zones 2 or 3. Detroit is still the major consumption area and the proposed Zone 3 is still the major surplus area. However, there is an acute lessening of population and demand in Detroit, a slight rise in both farther out, and an overall high per capita increase in production in the Order.

The Secretary's decision properly analyzes the evidence and shows: increased per capita supplies, sharply decreased comparative demand in the Detroit area, and increased population farther out in proposed Zone 1, and in proposed Zones 2 and 3; a changed situation from 1977 results in less need to move milk to the Detroit consumption center.

The Secretary established a need for a change in the Order, and chose to create three mainly self-sufficient zones with small location adjustments between each zone *(id.* at 26,772-73). This choice of remedy is largely a matter of the Secretary's discretion, not subject to second-guessing, and must be upheld unless irrational or not based upon substantial evidence of record *(see Borden, supra,* at 1376-79; slip op. at 69-73). Although the Secretary found little current need for

incentives to move milk in the marketing area (e.g., see evidence cited above), he took the cautious approach (54 Fed. Reg. 26,772-73 (1989)) and established three self-sufficient zones with small location adjustments drawing milk from the heavier production area to the heavier consumption area in case "there may be some need to attract limited amounts of additional milk" between zones (*id.* at 26,773). Such is hardly an action that fails to conform to the "minimal standards of rationality" that define the scope of review (*Ethyl Corp.*, quoted in § I, *supra).*

Petitioners advance their theories that different order provisions should have been adopted in order to move milk for Class II and Class III purposes (Petitioners' Brief on the Merits, *supra,* at 13-14, 19-22, 38-39). Petitioners' theory overlooks the fact that the basic purpose of location adjustments (and the Act itself) is to move milk for *fluid* milk demand *(In re Borden Inc., supra,* at 1400-03; sup op. at 103-07). In the Secretary's decision relating to the 1977 amendments to the location adjustment zones, which were the last location adjustment amendments prior to those at issue here, the Secretary's decision states (42 Fed. Reg. 37,562, 37,564, 37,565 (1977) (emphasis added)):

> The purpose of location adjustments and the direct delivery differential is to assure that milk is delivered as efficiently as possible to plants where it is needed *for Class I purposes*. Such adjustments, insofar as it is practicable, should be reflective of the cost of transporting milk from outlying locations to the principal consumption center in the market.
>
> ....
>
> As indicated elsewhere in this decision, the purpose of location adjustments is to encourage the delivery of

milk to plants in the market center (the Detroit area) *to meet their Class I needs* and to reflect the cost of transporting milk from outlying locations to such plants. The location pricing adopted in this decision gives appropriate recognition to these factors. In this circumstance, and in view of the more than adequate production to meet the market's Class I needs, the proposal to increase the Class I price is denied.

In the final analysis, it is apparent that petitioners would turn the Act inside out and have the Order operate for the benefit of cheese plants. However, it has long been held that lawful order amendments may not be overturned merely because they economically disadvantage particular producers or handlers. *In re Sequoia Orange, Co.*, 47 Agric. Dec. 2, 205-06 (1988), *aff'd in part and remanded sub nom. Riverbend Farms, Inc. v. Yeutter*, No. CV F-88-98 EDP (E.D. Cal. June 14, 1989), *printed in* 48 Agric. Dec. 1 (1989), *appeal docketed*, No. 90-15505 (9th Cir. April 24, 1990), No. 90-15781 (9th Cir. June 11, 1990).

Borden explains that complete equity is not required in a milk order, stating (46 Agric. Dec. at 1499 n. 54; slip op. at 253 n. 54):

> [54]As shown in many cases, *e.g., Schepps Dairy (§ VII(F), infra)*, the Secretary cannot, and is not required to, eliminate every cost disparity between handlers. As stated in *United States v. Mills*, 315 F.2d 828, 838 (4th Cir.), *cert. denied*, 375 U.S. 819 (1963):
>
> > After all, the Secretary must look at the area with a wide and comprehensive perspective. He has before him the entire output of milk in the area, and he must search for the best ways and means for its disposition. Aware of the annual consumption and

> distribution of fluid milk he must arrange to channel the residue into outlets the most advantageous to the producer and consumer. He fashions his order accordingly. Of course, there may be some resultant damage to a handler or producer in the enforcement of the Act but this lack of perfection does not destroy the validity of the Order. The constitutionality of the Act is no longer questionable. United States v. Rock Royal Co-op.,. supra, 307 U.S. 533, 568-581, 59 S.Ct. 993, 83 L.Ed. 1446. Absolute equality is not demanded to sustain the operation of the Order. If the Secretary cannot "produce complete equality, for the variables are too numerous", he "fulfills his role when he makes a reasoned" Order. Mitchell v. Budd, 350 U.S. 473, 480, 76 S.Ct. 527, 531-532, 100 L.Ed. 565 (1956).

The ALJ concludes (Initial Decision at 43-45) that petitioners Lansing and Liberty did not receive any economic benefit from the change in location adjustment zones, and the zone adjustments may thus not be legal. As noted above, however, lawful order amendments may not be overturned merely because they do not benefit any two particular handlers. Therefore, the Initial Decision and Order herein is erroneous in failing to uphold the Secretary's zone amendment.

Although the petitioners' and the ALJ's attack on the Secretary's decision is aimed primarily at the Secretary's reasoning, rather than upon the evidentiary basis for the facts *as stated by the Secretary*, I have read the entire rulemaking record, and have determined that the Secretary's decision is adequately supported by substantial evidence.

In addition, the Secretary's decision is rational, and is based on changes in circumstances that justified his zone

location adjustment changes. The Secretary was not writing on a clean slate. Location adjustments had been in effect in the area for decades (see note 18, *supra).* The Secretary was merely considering what changes were appropriate in view of the factual changes that had occurred since the location adjustments were last amended in 1977. Furthermore, we do not have to consider here whether the base price was appropriate to reflect the § 8c(18) criteria, e.g., to attract sufficient quantities of milk to the base zone for fluid use, since the Petition and Amended Petition do not challenge the Class I price. Indeed, it is questionable whether petitioners have a forum (except for rulemaking) in which to challenge the Class I price, since the Class I price now in the Order is the Class I price fixed by Congress in the Food Security Act of 1985 (7 U.S.C. § 608c(5)(A); *see Borden,* 46 Agric. Dec. at 1399-1403; slip op. at 101-07).

The location adjustments within the prior Zones 2 through 7 had previously been set at a level based on the location value of the milk delivered to such zones, compared to the location value of milk delivered to the base zone. The location adjustments in Zones 2 through 7 recognized the amount of the diminished value of milk delivered to such zones in 1977, as compared to the base zone, because of the increased hauling costs that would be incurred by the handlers in moving the milk to the base zone (42 Fed. Reg. 37,562, 37,562-65 (1977)). When the Secretary determined in 1989 that there had been population shifts and production shifts, so that there was no longer the same need to move milk to the base zone, the value of the milk delivered to handlers in zones outside of the base zone was no longer as diminished, *vis-a-vis* milk delivered to the base zone, as in 1977. Accordingly, since the milk delivered to the outlying zones in 1989 no longer had a reduced value in relation to the base zone in the same degree as in 1977, it was logical and rational to reduce the amount of the negative adjustment, to reflect the fact that

the milk in the outlying zones was no longer "less valuable" to the same extent as in 1977.

Finally, there is no basis for the ALJ's application of the principle that when an agency changes its course, it must supply a reasoned analysis indicating that prior policies are being deliberately changed, not casually ignored (Initial Decision at 39). As stated in *Borden* (46 Agric. Dec. at 1379; slip op. at 72-73):

> First, as to the 1975 merger decision, as shown below (§§ VI(B)(2)(b), VII(F)), that decision was based on the 1973-74 hearing record involved in the merger proceeding, which is a completely different hearing record from the 1983 hearing record involved here. The fact that in 1975 the Secretary refused to increase the location adjustment for Zone 8 *based on the evidence in the 1973-74* hearing record, while he increased the location adjustment for Zone 8 *based on the 1983 hearing record,* is not a reversal of position which imposes any higher standard on the Secretary than if he had not previously refused to increase the location adjustment 10 years earlier. The Secretary's action in 1985 is *the first* time that he considered whether to raise the location adjustment *based on the facts and circumstances contained in the 1983 hearing record.*

In any event, however, the Secretary fully explained the changed circumstances since 1977 that warranted a change in the 1977 zone location adjustments.

In summary, the Secretary's amendment for the revised location adjustment zones used in the marketing area (and a few additional counties) is fully supported by the record evidence in this proceeding.

B. There Is Substantial Record Evidence and a Rational Basis for the Revised Mileage Location Adjustment Rate for Plants Outside the Marketing Area.

In § V, *supra*, I found that the Secretary's explicit reasons for the mileage rate location adjustment were that the current rate seriously overstates the value of milk at the locations in question, and is seriously inadequate to reflect hauling costs incurred under current conditions. In § V, I also stated that courts have long approved and affirmed these reasons for revising location adjustments. Thus, if there is supporting substantial evidence on the record, and the Secretary's reasoning is rational, the Secretary's decision must be affirmed.

There is general agreement among the parties to the rulemaking that the $.01-per-cwt.-per-10-miles rate is seriously inadequate to reflect current transportation costs, and petitioners' allies generally recommend a 60% to 80% upward adjustment (Secretary's Order, *supra,* at 26,775-78). This constitutes uncontradicted substantial evidence that the current rate is not adequate to reflect hauling costs.

The Secretary conducted a "thorough analysis" of the suggested rates and "concluded that the best fit of location adjustments outside the zoned area results from the PEC proposal" (id. at 26,777). And, although the record did not contain detailed hauling cost information, there was a basis for the Secretary's decision to choose the $.0225-per-cwt.-per-10-miles rate, as follows (id. at 26,777-78):

> The record indicates that it costs about 2.25 cents per hundredweight per 10 miles to move milk within Michigan and 3.6 cents or more to move milk into Michigan from plants outside Michigan....

....

> The record in this proceeding, as previously indicated, does not contain detailed hauling cost information. But there is a basis for concluding that it costs more than 2.25 cents per hundredweight per 10 miles to move milk outside the State of Michigan. Therefore, there is no sound basis to consider further the alternative rates of 1.5 to 2.0 cents as suggested by several parties.

This numerical evidence was "based on the testimony of the PEC witness, who stated that the proposed 2.25-cent rate '— fairly well reflects the cost of transporting milk within Michigan'" (id. at 26,777).

Marketing-order milk should be at least theoretically available to meet the fluid needs of the market if necessary. At a $.01-per-cwt.-per-10-miles rate, milk delivered as far away as, for instance, Madison, Wisconsin, could never be available to meet the fluid needs of this marketing order. When producers receive too much money for delivering at distant plant locations (because the location adjustment rate is far too low), then the seriously-overstated value of that milk causes the producers at those locations to be subsidized by the other Order producers. Consequently, these subsidizing producers, by performing the service of ensuring the fluid needs of the market area, are being denied comparatively the full value of their milk. The rulemaking record contains this analysis, as follows (*id.* at 26,778 (emphasis added)):

> The value of milk at locations considerably distant from the central market must be related to the transportation costs that would be incurred in moving that milk to market. All the distributing plants that are fully regulated under the Southern Michigan order are located

> in the lower part of the State, mostly in the southern half of the State. Moreover, there is plenty of milk produced in this portion of the State to meet the market's needs. *Since location adjustments at distant supply plants* outside this area currently *do not realistically reflect transportation costs,* the blend prices applicable under the order at such locations *overstate the value of the milk to the Class I market.* Thus, the *producers in the southern part of the State are subsidizing producer incomes in the Upper Peninsula and Wisconsin areas* that supply milk to those supply plants. This situation would continue under the PEC proposals, but not to as great a degree as it now does.

The actual rate adopted, $.0225 per *cwt.* per 10 miles, clearly is reasonable and is not in excess of the average transportation rates outside the marketing area (Tr. 106-09, 117-18, 181-82, 191).

Petitioners argue that it inconsistent for the Secretary to consider the increased hauling costs as the primary justification for increasing the mileage rate, when increased hauling costs were not the primary justification for the Secretary's zone determinations (Petitioners' Reply Brief filed May 1, 1990, at 19-20). However, *Borden* explains that in view of the divergent facts applicable in different marketing areas, the same criteria cannot be used in every Order, or even in every zone within an Order, in determining the level of a particular location adjustment, as follows (46 Agric. Dec. at 1408-09; slip op. at 116-18):

> And the express statutory authority to promulgate location adjustments for milk delivered to handlers, based on the "locations at which delivery of such milk ... is made to such handlers" (5 U.S.C. § 608c(5)(A)), does not limit the Secretary to any specific formula for determining the

exact amount of the location adjustment. If any specific formula were implied in the statute, it would be actual, ascertainable transportation costs, which was the view of the dissenting judge, but not the majority, in *Schepps Dairy, Inc. v. Bergland,* 628 F.2d 11, 18-19, 23 (D.C. Cir. 1979) (see § VII(F), *infra)*....

Petitioners argue, based on a series of calculations, that if the same approach used by the Secretary here were used in all other zones, the results would be "unacceptable" (Answer of Petitioners to Respondent's Appeal Petition at 67).... If there were a location adjustment formula that could be applied in all areas, irrespective of factual differences as to the areas, Congress would have prescribed the location adjustment formula in the statute! But since Congress left this matter open, a method that produces a reasonable result in one zone does not become unreasonable merely because it does not produce reasonable results in other zones.

If the Secretary were required, as a matter of law, to use the same location adjustment formula in every milk order, or even in-every zone within the same milk order, a large number of location adjustments would be invalid. The methodology for computing location adjustments for different zones in an order varies widely, depending on all the circumstances that bear on a particular area's location adjustment. For example, in a single final decision involving the Texas order and five other orders, explaining changes made in location adjustments as a result of the Food Security Act of 1985 (51 Fed. Reg. 40,176 (1986)), the Secretary uses hauling rates of 1.7¢ (*id.* at 40,178), 2.1¢ (*id.* at 40,193), 2.2¢ (*id.* at 40,194), 2.25¢ (*id.* at 40,191), 3¢ (*id.* at 40,188), and 3.1¢ (*id.* at 40,186). (The Secretary's other decisions relating to changes in location adjustments arising from the Food

Security Act of 1985 are also instructive as to the many variables that have to be considered in changing location adjustments (see 51 Fed. Reg. 20,446, 26,224 (1986); 51 Fed. Reg. 24,677, 44,611 (1986); 51 Fed. Reg. 44,617 (1986)).

Since the facts and circumstances as to individual zones included in a milk order vary considerably, a Procrustean approach is neither desirable nor required. Petitioners' reliance, in this respect (Answer of Petitioners to Respondent's Appeal Petition at 67), on *Contractors Transport Corp. v. United States,* 537 F.2d 1160, 1162 (4th Cir. 1976) ("Patently inconsistent application of agency standards to similar situations lacks rationality and is arbitrary"), is misplaced in view of the divergent facts as to the various zones in the Texas milk order.

Furthermore, all of the marketing area covered by the Order (7 C.F.R. § 1040.2) is included in the zones (7 C.F.R. § 1040.52(a)(1)), whereas the mileage rate is applicable only to counties outside of the marketing area. This justifies a difference in treatment.

Petitioners suggested at the hearing that the rate be calculated from the state line, rather than the marketing area boundary, but they presented no evidence to justify this change. Moreover, the Petition and Amended Petition do not argue that use of the marketing area boundary is unauthorized by the Act or otherwise not in accordance with law.

I find that the rulemaking record contains substantial evidence in support of the Secretary's amendment to change the location adjustment rate to $.0225 per cwt. per 10 miles for plants located outside the marketing area, and that the Secretary's reasoning is rational.

VII. Petitioners' Cross-Appeal Petition Is Without Merit.

On January 10, 1991, petitioners filed a Cross-Appeal in which it is argued that the ALJ was in error for not making a specific ruling on petitioners' Proposed Findings of Fact Nos. 9 through 48, as they appeared in petitioners' Brief on the Merits, *supra*. However, petitioners note that the ALJ had a blanket ruling in which "all other proposed findings, conclusions and arguments are rejected as lacking legal or evidentiary bases" (Cross-Appeal at 2). Petitioners next argue that the ALJ acted within the law, but that "the better practice" would be for the ALJ (agency) to rule specifically on all 48 proposed findings (*id.* at 2-3). I conclude that there was no error in the ALJ's failure to rule specifically on each of petitioners' proposed findings.

All arguments made have been fully considered. To the extent that any arguments are inconsistent with the views set forth herein, and are not specifically mentioned, they are rejected as irrelevant, without merit, or without support in the record.

For the foregoing reasons, the following Order should be issued.

Order

The relief requested by petitioners is denied, and the Petition and Amended Petition are dismissed.

Done at Washington, D.C.

December 12, 1991

s/Donald A. Campbell
s/Donald A. Campbell
Donald A. Campbell
Judicial Officer

APPENDIX D

UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

In re:	)	
	)	
Lansing Dairy, Inc.,	)	
Liberty Dairy Company,	)	
and Frigo Cheese	)	
Corporation,	)	
	)	
Petitioners	)	90 Docket No. M 40-1

INITIAL DECISION AND ORDER

Procedural History

Petitioners, Lansing Dairy, Inc. (Lansing), Liberty Dairy Company (Liberty) and Frigo Cheese Corporation (Frigo), assert that amendments by the United States Department of Agriculture, through its Secretary, officers and employees (hereinafter the respondent) to the Federal Milk Marketing Order affecting commercial transactions in the Southern Michigan area,[1] were obtained in violation of the Agricultural Marketing Agreement Act of 1937, as amended, hereinafter

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[1] 7 C.F.R. Part 1040 (1989), which is occasionally referred to as Order 40.

the Act.[2] Petitioners proclaim that these violations were the result of a rulemaking procedure flawed by a failure of evidence, inconsistent with the results of prior orders, achieved upon an abuse of discretion in an arbitrary and capricious manner and not in accordance with the law. As a result of these actions, the petitioners state that they have suffered injury upon purchases of milk required in their interstate activities and that such annual damages exceed $72,500 to Lansing, $95,000 to Liberty and $500,000 to Frigo commencing with receipts of milk as of September 1, 1989. Petitioners seek the recovery of these actual and prospective damages on all verified deliveries subsequent to that date from the Order's producer-settlement fund, plus interest.

On October 31, 1989, Lansing, Liberty and Frigo, through counsel, John H. Vetne, Esq., Peterborough, New Hampshire, presented their petition, motion for a decision on the merits, and brief. Petitioners also on that same date applied for interim relief and moved for direct review by the Secretary. These were also supported by counsel's brief.

On November 20, 1989, counsel to the Department, Gregory Cooper, Esq., Washington, D.C., filed an opposition to petitioners' application for interim relief and on November 22, 1989, the Department, through its Judicial Officer, denied petitioners' motion for interim relief and for direct review. On November 29, 1989, the Department's Administrator of the Agricultural Marketing Service answered the petition, admitted jurisdictional issues and those related to party

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[2] This Act was preceded by the Agricultural Adjustment Act, May 12, 1933, and June 16, 1933, c. 90, 48 Stat. 199, relevant sections of which were explicitly incorporated into the Act of June 3, 1937, c. 296, 50 Stat. 246. References to these Acts are hereinafter cited as unofficially codified at, 7 U.S.C.A. §§ 601-674 (West 1980 & Supp. 1989).

identification and denied all other allegations, averring, that the petition fails to state a claim upon which relief could be granted and further averring that the amendments are supported by substantial evidence and are in accordance with the law. On December 15, 1989, petitioners' counsel, and on December 22, 1989, respondent's counsel, in response to a request for briefs, declined to pursue the voluntary establishment of an escrow account which might be utilized to protect the Order's settlement fund should respondent be found liable to petitioners for the sums expressed as damages and interest. On December 26, 1990, respondent's counsel was requested to file a responding brief to the petition on or before March 2, 1990.[3]

Petitioners, in their motion for direct review filed October 31, 1990, conceded that, "[R]eview of milk order rulemaking involves only issues of law, and no evidentiary hearing, is necessary or permitted, the record and rationale for the rule being limited to that developed in the rulemaking process." By letter filed December 22, 1990, respondent's counsel agreed "... that this review of a formal rulemaking record should be conducted by brief without an oral hearing." Therefore, no hearing was held in furtherance of, or in opposition to, this petition.

On January 2, 1990, a so-called Producers' Equalization Committee, an unincorporated association of four dairy farmer organizations, namely, the Independent Cooperative Milk Producers Association, Michigan Milk Producers Association, National Farmers Organization, Inc. and Southern Milk Sales,

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[3] Mr. Gregory filed a request for a revised briefing schedule on March 2, 1990. The Administrative Law Judge denied this request on March 6, 1990. The record also contains Mr. Gregory's brief filed March 28, 1990.

Inc., (hereinafter the PEC), through counsel, David Vanderhaagen, Esq. and Stephen J. Rhodes, Esq., of Lansing, Michigan, moved to intervene. This motion was granted[4] on January 2, 1990, upon the acquiescence of petitioners' and respondent's counsel. PEC's brief in opposition to the petition was filed March 1, 1990.

On January 31, 1990, petitioners' counsel was granted leave to file an amended petition, which had been filed on January 29, 1990. On March 2, 1990, Mr. Cooper executed

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[4] The order granting this motion reads, in part:

> It is noted that counsel's motion is presented on behalf of a Committee consisting of four corporate cooperatives. Counsel does not describe the legal organization or structure of this Committee, nor is there any indication that directions and orders of the undersigned would have any impact or obtain any degree of procedural compulsion upon a Committee. Therefore, it is taken that counsel's motion is presented on behalf of Independent Cooperative Milk Producers Association, Michigan Milk Producers Association, National Farmers Organization, Inc. and Southern Milk Sales, Inc. and such motion is granted for the presentation of a joint brief on behalf of these four corporations. This brief is to be filed on or before March 2, 1990, as counsel has been advised.
>
> It is further noted that counsel has not cited any rule by which the Committee or the four corporations might be validly considered as party intervenors. Therefore, pursuant to 7 C.F.R. § 900.57 (1989), counsel's brief shall be received into this record as if filed by a non-party, shall be considered as leaving but informational value and shall not be the basis for any relief to the Committee or the four corporations.

and filed a purported answer[5] to the amended petition. The Rules of Practice Governing Proceedings on Petitions to Modify or to be Exempted from Marketing Orders, provide at 7 C.F.R. § 900.52a that the Administrator of the Agricultural Marketing Service shall answer petitions. The Administrator did, in fact, execute respondent's answer filed herein on November 29, 1989. However, the rules do not provide that respondent's counsel may execute answers to petitions or answers to amended petitions. The Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary, 7 C.F.R. §§ 1.130.175 are not applicable to petitions filed, as here, pursuant to the Agricultural Marketing Agreement Act of 1937, as amended, excepting section 8c(14) therefore, 7 U.S.C.A. § 608c(14), which relates to the imposition of sanctions for the violations of orders. Accordingly, the purported answer to the amended petition has been filed outside the rules with the consequence that allegations of fact expressed in the amended petition are considered admitted by respondent.

Introduction

Petitioners' counsel advances this cause upon the Act, specifically, 7 U.S.C.A. 6O8(c)(15(A) and upon the Department's Rules of Practice Governing Proceedings on Petitions to Modify or to be Exempted from Marketing Orders, specifically 7 C.F.R. § 900.52 (1989). Those persons seeking relief from the imposition of order obligations, must file affidavits in support of petitions and must attest to the

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[5] This procedural aberration is noted by the Administrative Law Judge, as the petitioners had no opportunity to address it as an issue within their petition or amended petition. See *Farm Fresh, Inc.*, 49 Agric. Dec. ____, AMA Docket No. M-106-2, slip op. at 52-53 (April 12, 1990).

accuracy of facts alleged and asserted by such petitions. Affidavits by knowledgeable officers of petitioners, do accompany this petition and verify the truth of facts alleged.

These petitioners assert that the Secretary's adoption of specific amendments to Milk Marketing Order No. 40 were based upon incomplete evidence and flaunted judicial interpretation of the standards appropriate to order modifications. The challenged amendments were identified as material issues at the rulemaking stage.[6] These relate to changes in the magnitudes of technical prices known as location adjustments, both within geographically discrete areas known as zones, and beyond the geographic boundaries of those zones.

The Order's location adjustments were determined, prior to the complained-of amending, action of the Secretary, as follows.[7]

§ 1040.52 Plant location adjustments for handlers.

(a) For producer milk received at a pool plant and classified as Class I milk without movement in bulk to another pool plant and for which a location adjustment is applicable, the Class I price computed pursuant to § 1040.50(a) shall be reduced pursuant to paragraph (a)(1) or (2) of this section on the basis of the applicable rate per hundredweight for the location of such plant.

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[6] 54 Fed. Reg. 26,768, 26,769 (June 26, 1989).

[7] 7 C.F.R. § 1040.52(a)(1),(2)(Edition of January 1, 1989).

(1) Zone rates. For a plant located within the following described territory, including the cities located therein, the applicable zone rates shall be as follows:

MICHIGAN COUNTIES

ZONE I—NO ADJUSTMENTS

Genesee, Lenawee, Macomb, Monroe, OakLard, Wayne.

Bay (except Gibson, Mount Forest, Pinconning, Garfield, and Fraser Townships).

Saginaw (except Jonesfield, Richland, Lakefield, Fremont, Marion, Brant, Chapin, Brady, Chesaning, and Maple Grove Townships).

St. Clair (except Berlin, Riley, Mussey, Emmett, Lynn, Brockway, Greenwood, Grant, and Burtchville Townships).

Washtenaw (except Manchester, Bridgewater, Sharon, Freedom, Sylvan, Lima, Lyndon, and Dexter Townships).

ZONE II—5 CENTS

Ingham,[8] Jackson, Livingston.

Washtenaw (all the townships excluded from Zone I).

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[8] Lansing's plant is in Ingham County. (Footnote added)

ZONE III—7 CENTS

Arenac, Clinton, Eaton, Gladwin, Gratiot, Huron, Isabella, Lapeer, Midland, Sanilac, Shiawassee, Tuscola.

Bay (all the townships excluded from Zone I).

Ionia (except Otisco, Orleans, Keene, Easton, Boston, Berlin, Campbell, and Odessa Townships).

Montcalm (except Reynolds, Winfield, Cato Belvidere, Pierson, Maple Valley, Pine, Douglass, Montcalm, Sidney, Eureka, and Fairplain Townships).

Saginaw (all the townships excluded from Zone I).

St. Clair (all the townships excluded from Zone I).

ZONE IV—9 CENTS

Barry, Branch, Calhoun, Hillsdale, Kalamazoo, Kent, Mecosta, St. Joseph.

Allegan (all the townships excluded from Zone V).

Ionia (all the townships excluded from Zone III).

Montcalm (all the townships excluded from Zone III).

ZONE V—11 CENTS

Berrien, Cass, Clare, Iosco, Lake, Mason, Missaukee, Muskegon, Newaygo, Oceana, Ogemaw, Osceola,[9] Ottawa, Roscommon, Van Buren.

Allegan (except the townships of Dorr, Gunplain, Hopkins, Leighton, Martin, Otsego, Watson, and Wayland).

ZONE VI—14 CENTS

Alcona, Crawford, Grand Traverse, Kalkaska, Manistee, Oscoda, Wexford.

ZONE VII—17 CENTS

Alpena, Antrim, Benzie, Charlevoix, Cheboygan, Emmet, Leelanau, Montmorency, Otsego, Presque Isle.

(2) Mileage rate. For any plant at a location outside the territory specified in the preceding paragraph (a)(1) of this section,[10] the applicable adjustment rate per hundredweight shall be based on the shortest highway distance between the plant and the nearest point in such territory as determined by the market administrator, and shall be the amount of the zone differential applicable at such point plus 1¢ for each 10 miles or fraction thereof from such point.

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[9] Liberty's plant is in Osceola County. (Footnote added)

[10] Frigo's plants are in Menominee County, Michigan, in the town of Lena, Wisconsin, and, as of May 24, 1988, in the town of Wyocena, Wisconsin. (Footnote added)

* * * * *

The amendments to the Order are:[11]

§ 1040.52 [Amended]

2. In § 1040.52, revise paragraph (a)(1) to read as follows:

(a) * * *

(1) Zone rates. For a plant located within the following described territory, including, the cities located therein, the applicable zone rates shall be as follows:

Michigan Counties

Zone 1—No Adjustments

Clinton, Genesee, Gratiot, Hillsdale, Huron, Ingham, Jackson, Lapeer, Lenawee, Livingston, Macomb, Monroe, Oakland Saginaw, Sanilac, St. Clair, Shiawassee, Tuscola, Washtenaw and Wayne.

Bay (except Gibson, Mount Forest, Pinconning, Garfield and Fraser Townships).

Zone II—5 Cents

Allecgan, Barry, Berrien, Branch, Calhoun, Cass, Eaton, Ionia, Kalamazoo, Kent, Montcalm, Muskegon, Ottawa, St. Joseph and Van Buren.

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[11] Final Rule, 54 Fed. Reg. 29,327, 29,328 (July 12, 1989).

Zone III—7 Cents

Bay (all townships excluded from Zone 1). Alcona, Alpena, Antrim, Arenac, Benzie, Charlevoix, Cheboygan, Clare, Crawford, Emmet, Gladwin, Grand Traverse, Isabella, Iosco, Kalkaska, Lake, Leelanau, Manistee, Mason, Missaukee, Mecosta, Midland, Montmorency, Newago, Oceana, Ogemaw, Osceola, Oscoda, Otsego, Presque Isle, Roscommon and Wexford.

* * * * *

§ 1040.52 [Amended]

3. Amend § 1040.52(a)(2) by changing "1¢" to "2.25 cents."

Upon consideration of all matters of record, the following Findings of Fact are made and Conclusions of Law are reached. As a result thereof, the relief sought by petitioners is ordered. All other proposed findings, conclusions and arguments are rejected as lacking legal or evidentiary bases. As used herein, the Secretary's rulemaking procedures and rationale are identified by references to the relevant portions of the Federal Register. References to transcript pages, refer to the transcript of the rulemaking hearings in Docket AO-225-A39 (DA-88-047) held on May 24, 1988, in Romulus, Michigan. References to exhibits are to those received into the record at that hearing.

Findings of Fact

1. Lansing Dairy, Inc., is a Michigan corporation which has its offices and principal place of business at 2224 West Willow Street, Lansing, Michigan 48901, and is a regulated "handler," as defined in § 1040.9 of the Federal Regulations

Governing the Marketing of Milk in Southern Michigan ("Order 40") (7 C.F.R. § 1040.9 (1988)), by virtue of operating, a pool distributing, plant at Lansing (Ingham County), Michigan. The principal officers of Lansing are: Michael George, president, 3O777 Northwestern Highway, Farmington Hills, Michigan 48018; Thomas George, treasurer, 31111 Industrial Road, Livonia, Michigan 48150; and Bruce E. BeVier, senior vice-president and general manager, 2224 West Willow Street, Lansing, Michigan 48901. Lansing Dairy is a wholly-owned subsidiary of Melody Foods, Inc., a privately-held-Michigan corporation. (Petition, Answer)

2. Liberty Dairy Company, is a Michigan corporation which has its offices and principal place of business at 530 North River Street, Evart, Michigan 49631, and is a regulated "handler," as defined in § 1040.9 of the Federal Regulations Governing the Marketing of Milk in Southern Michigan, by virtue of operating a pool distributing plant at Evart (Osceola County), Michigan. The principal officers of Liberty are: Howard Dean, president; William Fisher, vice-president; Eric Blanchard, secretary; Dale Hecox, treasurer; the foregoing having a business address at c/o Dean Foods Co., 3600 River Road, Franklin Park, Illinois 30131; Roger Beute, vice-president-sales; and Gordon Willis, vice-president-production; each having a business address at 530 North River Street, Evart, Michigan 49631. Liberty is a wholly-owned subsidiary of Dean Foods Co., a publicly-held corporation. (Petition, Answer)

3. Frigo Cheese Corporation, is a Wisconsin corporation with corporate offices at 108 Springhurst Drive, P.O. Box 19024, Green Bay, Wisconsin 54307-9024. Frigo is a "handler," as defined in § 1040.9 of the Federal Regulations Governing the Marketing of Milk in Southern Michigan, by virtue of operating a pool supply plant at Carney (Menominee

County), Michigan. Frigo also operates a pool supply plant in Lena, Wisconsin, and operated a pool supply plant in Wyocena, Wisconsin, as of May 24, 1988. The principal officers of Frigo are: David Leonhardt, president; Roger LeBreck, vice-president-operations; Richard Grafen, vice-president-sales; and Charles Fagen, vice-president-finance; all having a business address at 1088 Springhurst Drive, P.0. Box 19024, Green Bay, Wisconsin 54307. Frigo is a wholly-owned subsidiary of Unigate P.L.C., a publicly-held British corporation. (Petition, Answer)

4. On May 24, 1988, the Secretary conducted a formal rulemaking hearing to consider amendments to Order 40 proposed by a group of dairy farmer cooperative associations, comprised of the Independent Cooperative Milk Producers Association, Michigan Milk Producers Association, National Farmers Organization, Inc. and Southern Milk Sales, Inc. organized as the Producers' Equalization Committee. At that time, the four PEC members, marketed approximately 87% of milk pooled on Order 40, but a much smaller percentage of Order 40 milk delivered to plants located in the Upper Peninsula and in Wisconsin. Order 40 milk pooled at plants in Wisconsin and the Upper Peninsula was marketed primarily through Farmers Union Milk Marketing Cooperative and the Manitowoc Milk Producers Cooperative, which were suppliers to Frigo, and which were not co-sponsors of the proposal. (Petition, Answer, PEC's Brief filed March 1, 1990).

5. The PEC proposals at issue were to modify location adjustments to handler Class I and producer uniform prices under Order 40 in two respects. PEC proposed to reduce the location adjustments, which are credits to which handlers are entitled, at plants in Zones II to VII in the Southern Peninsula, and to reduce the number of pricing zones to three. This proposal, ultimately adopted and issued as the amendment to 7 C.F.R. § 1040.52(a), reduced Lansing's credits at its

Ingham County plant from 5¢ per hundredweight to 0¢, which means that Lansing's cost of procuring milk increased 5¢ per hundredweight and that the prices received by producers shipping milk to Lansing's plant increased by 5¢ per hundredweight. This amendment also reduced the credits Liberty receives on milk purchases at its Osceola County plant from 11¢ per hundredweight to 7¢ per hundredweight, which means that Liberty's costs of milk procurement increased 4¢ per hundredweight and that the prices received by producers shipping milk to Liberty's plant increased by 4¢ per hundredweight. Both Lansing and Liberty have above-class price obligations because most of their milk purchases are classified as Class 1. PEC also proposed, to increase location adjustments in the Upper Peninsula and Wisconsin portions of the milkshed based on a rate of 2.25¢ per hundredweight per 10 miles, a rate substantially exceeding location adjustment rates in other regulated markets in the north central states. The reduction in uniform price, as calculated pursuant to 7 C.F.R. §§ 1040.60-.62 to producers delivering milk to Frigo's plants in Michigan and Wisconsin under this proposal ranged from 13¢ per hundredweight at Frigo's Carney, Menominee County Michigan plant, 20¢ per hundredweight at Frigo's Lena, Oconto County Wisconsin plant and 23¢ per hundredweight at Frigo's Wyocena, Columbia County Wisconsin plant. These three Frigo plants are not located within Order 40. This proposal, adopted and issued as 7 C.F.R. § 1040.52(a)(2) ultimately increased Frigo's costs of milk procurement, because Frigo as a cheese producer enjoyed below-average Class I price obligations which, with an increase of the mileage rate, an absolute factor, from 1¢ to 2.25¢ per hundredweight per 10 mile increments, could pay producers 1.25¢ less on accounts settled through the Order's fund. Thus, Frigo, in its settlements directly with its producers must now pay a private parity to these producers so as to maintain established sources of supply. (Petition, Answer, Petitioners' Brief, PEC's Brief, 7 C.F.R.

§ 1040.52(a)(1) (Edition of January 1, 1989); 7 C.F.R. § 1040.52(a)(1), effective September 1, 1989; 54 Fed. Reg. 26,777 (June 26, 1989); 54 Fed. Reg. 29,328 (July 12, 1989)).

6. Petitioners appeared and presented testimony at the formal rulemaking hearing on May 24, 1988, and filed post-hearing briefs challenging the lawfulness and propriety of the PEC location adjustment proposals. (Petition, Answer)

7. On February 21, 1989, the Secretary issued a Recommended Decision, published at 54 Fed. Reg. 7,938 (February 24, 1989), which recommended adoption of the PEC location adjustment proposals. Each of the petitioners filed exceptions to the Recommended Decision. (Petition, Answer)

8. On June 20, 1989, the Secretary issued a Final Decision, published at 54 Fed. Reg. 26,768-26,78O (June 26, 1989), adopting the PEC location adjustment proposals and rejecting the exceptions submitted by petitioners and others. On July 6, 1989, the Secretary issued a final rule amending the pricing regulations of Order 40, as requested by PEC, effective for milk marketed on and after September 1, 1989. This rule was published at 54 Fed. Reg. 29,327-29,328 (July 12, 1989). Sections 1040.52(a)(1) and 1040.52(a)(2), as amended, are at issue herein. (Petition, Answer)

9. As a general finding supporting the amendments as adopted, the Secretary determined that:

> The parity prices of milk as determined pursuant to section 2 of the Act are not reasonable in view of the price of feeds, available supplies of feeds, and other economic conditions which affect market supply and demand for milk in the said marketing area; and the

minimum prices specified in the order, as hereby amended, are such prices as will reflect the aforesaid factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest; ... (54 Fed. 29,328 (July 12, 1989))

10. Under the terms of Order 40, petitioners have been required to account to the producer-settlement fund for the higher Class I prices in the Southern Peninsula subsequent to October 13, 1989, and monthly thereafter, or has received funds from the producer-settlement fund, reflecting the September price changes, subsequent to October 14, 1989, and monthly thereafter; and producers, on October 15, 1989, have received an increase in the uniform price for milk delivered to plants outside of (former) Zone I in the Southern Peninsula, and a substantially reduced uniform price for September milk delivered to plants in the Upper Peninsula and Wisconsin. (Petition, Answer)

11. The Secretary's amendments to the rules governing the operation of Order 40 were to change and amend"...the plant location adjustments to prices under the Southern Michigan order." (54 Fed. Reg. 26,768 (June 26,1989), 54 Fed. Reg. 29,327 (July 12, 1989))

12. The amendments to 7 C.F.R. § 1040.52(a)(1) acknowledged that: "These changes will produce a flatter Class I and uniform price structure within the marketing area ...." "The current zone pricing structure has been in place since 1977." (54 Fed. Reg. 26,772 (June 26, 1989)) "This [present] arrangement results in misalignment of Class I prices between the two orders. Thus, a minus 5¢ zone in Southwestern Michigan will provide Class I price alignment in four Michigan counties that are part of the Indiana Marketing Area."... "[T]here seems to be no need for a higher price at Evart to attract milk from the Cheboygan

area."... "The justification for fewer pricing zones is further reinforced by looking at the marketing situation overall."... "These changes call for eliminating some of the highly structured zone pricing that has been operational since 1977."... "Under the changed zone structure, Lansing Dairy will be affected two ways. First, the Class I price under the Order at Lansing will be five cents higher than it now is." ..."... [P]lants in the same general area will be treated alike and pricing equity among these competing handlers will continue." (54 Fed. Reg. 26,773 (June 26, 1989)) The Secretary admitted that, "Kraft's point about alignment of prices between Southern Michigan and Indiana Orders in Kalamazoo County, Michigan, is correct."... "Kraft's claim that the PEC proposals diminish price alignment is correct at some locations while the PEC's claim that their proposals improve price alignment with Indiana is true at other locations."... "Moreover, the price changes are not of sufficient magnitude to have any measurable production response."... "...[T]he change from seven pricing zones to three pricing zones is not tied to the cost of moving milk."... "...[T]he new pricing structure will reflect three basically self-sufficient pricing zones...." (54 Fed. Reg. 26,774 (June 26, 1989)) A recommended proposal by Dean Foods Company, the owner of Liberty's capital stock, to amend the location adjustment provisions of the Rio Grande Valley Marketing Order, 7 C.F.R. Part 1138, was rejected (Petitioners' Brief, Exhibit A) by the Department on March 22, 1989 as follows:

> The basic purpose of adjusting the price of milk for the plant location where the milk is delivered is to better assure that adequate milk supplies will be made available for fluid use at such plants. More specifically, this involves setting higher prices at city plant locations than at plants located in the milk production areas to help defray the extra cost of moving milk from production areas to the major outlets.

Citation to this rationale provides relevant understanding of the Secretary's amendments herein for this rejection was characterized as follows:

> The Dean proposals were denied because they were inconsistent with the purpose of location adjustments since the proposals would have increased the price of milk in an area of surplus production and decreased the price of milk in an area that is slightly deficit in terms of local supplies. (54 Fed. Reg. 26,775 (June 26, 1989))

The Secretary concluded:

> The primary purpose of location adjustments continues to be to provide an incentive to move milk from the production area to the consumption center. (54 Fed. Reg. 26,775 (June 26, 1989))

13. The use of location adjustments to modify the computation of Class I and uniform price differentials at plants located outside the specified zones, pursuant to 7 C.F.R. § 1040.52(a)(2) was considered appropriate, because the location adjustment rate of but"... 1¢ per hundredweight per 10 miles seriously overstates the value of milk to the Southern Michigan pool at locations considerably distant from the central market." (54 Fed. Reg. 26,775-26,777 (June 26, 1989)) Further, the 1¢ location adjustment rate"... results in Class I and uniform prices at the various locations that are too high relative to the prices of milk in the marketing area because the rate does not reflect the cost of hauling milk." (54 Fed. Reg. 26,777 (June 26, 1989)) And, again, "since location adjustments at distant supply plants outside this area currently do not realistically reflect transportation costs, the

blend prices[12] applicable at such locations overstate the value of the milk to the Class I market." As a result,"... the producers in the southern part of the State are subsidizing producer incomes in the Upper Peninsula and Wisconsin areas that supply milk to those supply plants." (Including Frigo's three plants)... "Ideally, location adjustments rates under the Southern Michigan Order would provide Class I prices at the plant locations equal to the applicable Class I price at such locations for the Order marketing area in which the plants are located." ... "The location adjustment rate change will result in lower blend prices under the Southern Michigan Order at these locations...." "The only purpose for adopting the 2.25¢ per hundredweight per 10 miles rate is so that the value of milk at these distant locations will more nearly reflect the cost of moving milk to the market." (54 Fed. Reg. 26,778 (June 26, 1989)) The Secretary has also denied that the location adjustment rate was changed for the purpose of improving blend price alignment between the Southern Michigan and Chicago Orders. (54 Fed. Reg. 26,778-26,779 (June 26, 1989))

14. The Secretary has recognized that the amendments to "...the location pricing provisions (both the zoning and rate issues) will change the total value of pooled milk by a small account." An example of this amount was $40,000 per month. (54 Fed. Reg. 26,778-26,779 (June 26, 1989))

15. The displaced effects of the Secretary's amendments to 7 C.F.R. § 1040.52(a)(1) and 7 C.F.R. § 1040.52(a)(2) were to increase the value of milk and hence the prices received by farmers for their production. (Findings 12, 13, 14)

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[12] The uniform prices established pursuant to 7 C.F.R. § 1040.60-.62 are known as the blend prices.

16. On September 21, 1989, after the issuance of the final decision, the Secretary of Agriculture, by counsel, in argument to the United States District Court for the Western District of Michigan, revealed that important considerations of the Secretary of Agriculture in making the subject location adjustment amendments were: (a) a very small percentage of milk received by Frigo is used for Class I purposes, and virtually all of Frigo's milk is used for Class III, or cheese, (b) the purpose of the marketing order and the Act is to assure supplies for Class I use, (c) that Frigo, while not supplying the fluid market, had drawn significant sums of money from the pool in order to pay producers and (d) the action of the Secretary reducing blend prices for milk delivered to the Frigo plants was intended to correct the foregoing situation. Counsel's statements comport with the Secretary's rationale expressed at 54 Fed. Reg. 26,777-26,778 (June 26, 1989). The reasons advanced by the Secretary to the District Court, which related the price of milk which should be received by Frigo producer patrons to the use made of Frigo milk receipts, is expressly prohibited by the Agricultural Marketing Agreement Act, and such rationale serving any part as the basis for the Secretary's decision renders the decision unlawful. (Petitioners' Amended Petition filed January 29, 1990; Admitted by Respondent)

17. Milk production substantially exceeded consumption during 1987 in Order 40. In 1987, Class I use of producer milk was but 43.4%. (Exhibit 5, Table No. 3) With reference to the geographic area which has become Zone 1, the no-adjustment zone, the Secretary observed"... there is a good balance between production and Class I use in this area." And, referring to the geographic area which has become Zone II, the plus 5¢ adjustment zone, the Secretary wrote, "...there appears to be plenty of milk to serve this area." And, referring to Zone III, the plus 7¢ adjustment zone, the Secretary stated: "This zone also appears to be self-sufficient

with respect to milk supply and demand." (54 Fed. Reg. 26,773 (June 26, 1989)

18. The Secretary's analyses advanced in support of the reduced location adjustments promulgated at 7 C.F.R. § 1040.52(a)(1) and the increased rate of adjustments promulgated at 7 C.F.R. § 1040.52(a)(2) did not express or rely on the increase of consumption within Zone I as it was defined in the proposed amendment for all classes of milk between 1977 and 1987. The data descriptive of the increase of Zone I consumption by all handlers, including, those producing bottled milk, butter and hard cheese, is found in rulemaking record. (Exhibits 10-A, 10-C, 15; Tr. 203. See also Petitioners' Proposed Findings pp. 13-16)

19. The Secretary relied on three factors to justify the amendment to 7 C.F.R. § 1040.52(a)(1). These were (a) population shifts, (b) plant closing and (c) increased milk production and were those changes that "...warrant fewer zones and less incentive to move milk toward the Detroit Metropolitan area from the outlying production areas." (54 Fed. Reg. 26,772 (June 26, 1989))

20. The Secretary relied on but one factor to justify the amendment to 7 C.F.R. § 1040.52(a)(2). This was the increased costs of hauling milk. "...[I]t is clear that a transportation rate of 1.0¢ per 10 miles per hundred weight is seriously inadequate to reflect hauling costs incurred under current conditions." (54 Fed. Reg. 26,777 (June 26, 1989)) Further, the Secretary wrote:

> The value of milk at locations considerably distant from the central market must be related to the transportation costs that would be incurred in moving, that milk to market.

* * * * *

> The only purpose for adopting the 2.25¢ per hundredweight per 10 miles rate is so that the value of milk at these distant locations will more nearly reflect the cost of moving milk to the market. (54 Fed. Reg. 26,778 (June 26, 1989))

21. The Secretary expressly relied upon the Act at § 8c(5)(A) (7 U.S.C.A. § 608(c)(5)(A)) as the only authority to provide the location adjustments, both within the defined zones, and beyond those zones, amended by the final rule effective on September 1, 1989, and expressed at 54 Fed. Reg. 29,327-29,328 (July 12, 1989). The Secretary also expressly declined to rely upon the Act at § 8c(18) (7 U.S.C.A. § 608c(18)) as authority for the action taken herein, asserting that a change in the Class I differential would be warranted if supply and demand changes required an impact upon milk production.

The Secretary wrote:

> The Class I differential, which is established at the base or "zero" zone, is $1.75, and would not be changed. Section 8c(18) is the authority for the Secretary to change the Class I differential if supply and demand warrants a chance in order to increase or decrease milk production. The *authority for the Secretary to provide for pricing zones (location adjustments) in an order is found in section 8c(5)(A) of the Act*. (54 Fed. Reg. 26,774-26,775 (June 26, 1989)) (Emphasis added, parenthetical material in original)

Discussion

This petition attacks the Secretary's selection of the applicable statutory authority by which the Southern Michigan Milk Order was amended. The use of one section of the statute, 7 U.S.C.A. § 608c(5)(A), which was the derivative authority applied by the Secretary, avoids the economic analyses required by another section, 7 U.S.C.A. § 608c(18), as a precondition to the amendment of any milk marketing order. Hence, in order to sustain the Secretary's action, the statute must grant the authority as exercised, considering, the effects sought and realized.

Pricing by Location

The production and marketing of milk and its products has long been a regulated industry, free of open competition and exempt from anti-trust constraints. This structure is considered the necessary result of the productive cycle of the bovine, which presents copious capacity during certain months of each year. This capacity is laid on consumption levels which remain constant. Hence, programs and their hardware must be available to timely absorb and divert the excesses.

One such program is that established by this Act. It attempts to assure equilibrium in marketing activities to all producers within geographical discrete districts. It does this by recognizing that milk has different uses, that milk has different values based on those uses, and that milk has different values based on its location. For example, milk used by humans as a liquid food in a city location has a greater value than milk used for cheese production in a country plant. However, in order to assure a supply of fluid milk, known as Class I, to population centers, a greater number of producers must be willing to supply that use during periods of low production. The producers' participation in this supply is

encouraged by the Act which establishes a series of common marketing schemes, referred to as pools, which provide uniform prices to all producers irregardless of the use classification of their particular production. Exceptions do exist and these are expressed in the Act at 7 U.S.C.A. § 608c(5)(A). This section provided, as of the effective date of the presently complained-of amendment as follows:

> (5) Milk and its products; terms and conditions of orders
>
> In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section) no others:
>
> (A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers. Such *prices* shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers. Throughout the 2-year period beginning on the effective date of this sentence (and subsequent to such 2-year period unless modified by amendment to the order involved), the *minimum aggregate amount* of the adjustments, under clauses (1) and (2) of the preceding sentence, to *prices* for milk of the highest use classification under orders that are in effect under this section on December 23, 1985, shall be as follows:

Marketing Area Subject to Order	Minimum Aggregate Dollar Amount of Such Adjustments Per Hundredweight of Milk Having 3.5 Percent Milkfat
* * *	* * *
Southern Michigan	$ 1.75
* * *	* * *

Effective at the beginning of such two-year period, the *minimum prices* for milk of the highest use classification shall be adjusted for the locations at which delivery of such milk is made to such handlers.

(B) Providing:

* * * * *

(ii) for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered;

subject, in either case, only to adjustments for (a) volume, market, and production differentials customarily applied by the handlers subject to such order, (b) the grade or quality of the milk delivered, (c) the locations at

which delivery of such milk is made,...[13] (Emphasis added) This legislation has been explained by the Department's Judicial Officer as follows:

In enacting, § 131 of the Food Security Act of 1985, Congress was confused as to the mechanics of milk orders, but the legislative intent is clear....

* * * * *

The legislative history, quoted below, shows clearly that Congress intended to set forth in the table the minimum Class I price differentials for each of the 44 milk marketing orders. But the Class I price differentials are not, in fact, adjustments under clauses (1) and (2) of § 8c(5)(A). For practical reasons, the Class I price in milk orders is not set forth as a specific amount, e.g., $10 per cwt, but, rather, is set forth as a formula, *viz.*, the sum of the Minnesota-Wisconsin price, which is commonly known as the basic formula price (see, e.g., 7 C.F.R. § 1126.51), and a specific amount (e.g., $2.32 (7 C.F.R. § 1126.50(a)), which is commonly known as the Class I price differential. The Class I price (which *includes* the Class I price differential) is the minimum

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[13] December 23, 1985, Pub. L. 99-198, Title 1, Sec. 131(a). This amending Act, known as the Food Security Act of 1985, was in effect on July 6, 1989. The adoption of these marketing differentials was opposed in subcommittee mark-up of this bill by the Department's economist, Mr. Ed Coughlin. H.R. Rep. No. 99-271, 99th Cong., 1st Sess., pt. 1, at 366 (1985), reprinted in 1985 U.S. Code Cong. & Admin. News 1103, 1470. The Secretary subsequently inserted these Class I differentials into all 44 then existing orders. These differentials were indexed by the Secretary as "class prices." See for example, 7 C.F.R. § 1040.50(a), 51 Fed. Reg. 12,830, 12,832 (April 16, 1986).

> price that all handlers are required to pay for milk disposed of in the form of fluid milk product, subject to three adjustments, including the two adjustments under clauses (1) and (2) of § 8c(5)(A) referred to in the amendatory legislation. Those adjustments *change* the uniform price for particular handlers, depending on particular circumstances involving the handlers. The congressional confusion, in erroneously thinking that the Class I price differential is an *adjustment* to the Class I price, rather than an integral part of the Class I price that is subsequently adjusted under the three clauses set forth above, is of no consequence here, since the legislative history is so clear as to the congressional intent.[14] (Emphasis and parenthetical material in original)

Confusion may have been introduced by the Secretary's previous use of the term "location differentials," as at 7 C.F.R. § 1040.81 (1969), in provisions relating to the payment of, or receipt of, credits based on "location adjustments," as authorized at 7 C.F.R. § 1040.54 (1969).[15] The use of the term "location differentials" was eliminated from Order 40 in 1973.[16]

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[14] *Borden, Inc., et al.*, 46 Agric. Dec. 1315, 1399-1400, ftn. 16, (1987) *aff'd* unreported memorandum opinion, No H-88-163 (S.D. Tex.) (February 13, 1990). See Conference Report on H.R. 2100 Food Security Act of 1985, 99th Cong. 1st Sess., 131 Cong. Rec. Part 26, 37,069, December 17, 1985, which identifies the Class I differentials, as such, at 7 U.S.C.A. § 608c(5)(A).

[15] 33 Fed. Reg. 6,614, 6.620, 6,623 (May 1, 1968).

[16] 38 Fed. Reg. 4649 (February 20, 1973). See also 38 Fed. Reg. 2374 (January 24, 1973) and 37 Fed. Reg. 26,318 (December 9, 1972).

Additionally, the Secretary has previously used the term "zone differential," for example see 7 C.F.R. § 1001.62 (1965), and has determined that:

> The purpose of establishing zone differentials is to achieve a high degree of uniformity in prices to all handlers f.o.b. the market for milk which is received from producers at plants located at varying distances from the principal consumption area. To achieve this purpose, the zone differentials must closely reflect costs generally incurred in receiving milk at country plants and moving such milk to city plants.[17]

The legislative history to which reference was made, in *Borden Inc. et al.*, 46 Agric. Dec. 1315 (1987) is that which amended 7 U.S.C.A. § 608c(5)(A). This history, displays a stark political process[18] and discloses that:

> Section 231 contains an amendment to section 8c(5)(A) of the Agricultural Adjustment Act, to revise the

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[17] 29 Fed. Reg. 11,205, 11,210 (August 4, 1964).

[18] The mark-up session of the Agriculture Committee on July 9, 1985, resulted in the inclusion of the following:

> Mr. Lewis [Tom Lewis of Florida] offered an amendment to revise the minimum adjustments to prices in Florida for Class I fluid milk. Mr. Lewis stated this amendment would correctly align the differentials for Upper Florida at $3.58, Tampa Bay at $3.88, and Southeastern Florida at S4.18. Mr. Coelho said he had previously reviewed the amendment and supported its adoption. The Committee agreed to the amendment by voice vote.

H.R. Rep. No. 99-271, 99th Cong., 1st Sess., pt. 1, at 368 reprinted at 1985 U.S. Code, Cong. & Admin. News 1472.

milk marketing order program. New provisions would be added to section 8c(5)(A) of the Act, which now provides that milk marketing orders must contain terms and conditions for (1) classifying milk in accordance with the form in which, or the purpose for which, it is used, and (2) fixing or providing a method for fixing minimum prices for each use classification. Section 8c(5)(A) also now provides that minimum prices must be uniform as to all handlers, subject only to adjustments for (a) volume, market, and production differentials customarily applied by the handlers subject to the order, (b) grade or quality, and (c) the locations at which delivery is made.

The new added provisions would specify the minimum aggregate amount of the adjustments for (1) volume, market, and production differentials customarily applied, and (b)*/ grade or quality, to prices for milk of the highest use classification (the "Class I differential") for the 44 milk marketing orders. Each marketing area subject to an order is listed in section 831, along with the minimum Class I differential, specified in dollars and cents, to be applicable to the area.

The minimum Class I differentials specified in the bill would be in effect for the two-year period starting with the first day of the first month beginning more than 126 days after the date the bill is enacted. Further, the specified differentials would continue in effect after the two-year period expires unless modified by amendment to the order involved.

The new provisions also provide that, at the beginning of the two-year effective period, the minimum prices for Class I milk would have to be adjusted for the

locations at which delivery of Class I milk is made to handlers ....[19]

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*/ So in original. Probably should be "(2)".

However, the 1985 Amendment to the Act did not affect the exception which this petition addresses at 7 U.S.C.A. § 608c(5)(A)(3); "...the locations at which delivery of such milk, or any use classification therefore, is made to such handlers."

This exception, which provides for the so-called location adjustments, has been, from 1935, in this same language,[20] a key to the Act. Location adjustments are, those credits given to producers as an incentive to "move milk" from areas of production to areas of consumption.[21] Location adjustments are most frequently identified as "milk-movers" within the various orders; location differentials, the kin of location adjustments, are fixed increments of pricing formulas based on distances to the various orders from Eau Claire, Wisconsin, and are justified as "milk-movers" from that

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[19] *Id.*, at 213, 1985 U.S. Code Cong. & Admin. News 1316-1317.

[20] Agricultural Adjustment Act Amendments, ch. 641, 49 Stat. 750, 754 (August 24, 1935), 7 U.S.C.A. § 608c(5)(A)(3).

[21] 54 Fed. Reg. 26,775 (June 26, 1989).

approximate center[22] of continental United States milk production to the various orders.

While much has been written of location adjustments since 1935, some of which will be inserted hereafter, efforts to understand Congress' statute creating this exception and the methods Congress authorized the Secretary to apply in effecting changes to the exception, must begin with the statute, and with its associated congressional history.

The 1935 Act provided for location adjustments in language identical to that utilized in the 1985 Amendment, as follows:

> (5) In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section) no others:
>
> (A) ....Such prices shall be uniform as to all handlers, subject only to adjustments for..., and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers.
>
> (B) Providing:
>
> * * * * *
>
> (ii) for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such

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[22] "Class I prices vary from order to order depending on the distance from the Minnesota-Wisconsin region, but all are based upon the Minnesota-Wisconsin series Price." H.R. Rep. 99-271, 99th Cong., 1st Sess., pt. 1. 15, reprinted 1985 U.S. Code Cong. & Admin. News 1119. See also: 33 Fed. Reg. 6,027, 6,033 (April 19, 1968).

milk by the individual handler to whom it is delivered;

subject, in either case, only to adjustments for (a) volume, market, and production differentials customarily applied by the handlers subject to such order, (b) by the grade or quality of the milk delivered, (c) the locations at which delivery of such milk is made, and....[23]

The congressional reports on the proposed bill, scant though they be, are as follows:

* * * * *

Third. Subsection (5) of the proposed section 8c states specifically the terms which may be included in orders relating to milk and its products. These terms follow the methods employed by cooperative associations of producers prior to the enactment of the Agricultural Adjustment Act and the provisions of licenses issued pursuant to the present section 8(3) of the Agricultural Adjustment Act. Such orders any contain provisions classifying milk in accordance with its ultimate utilization, and may fix, or provide a method for fixing, minimum prices which shall be paid by handlers to producers for milk in each use classification. This provision makes it possible to take into consideration in orders dealing with milk, the difference in value between milk sold for consumption in fluid form and that used in the manufacture of such products as butter, evaporated milk, etc.

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[23] 49 Stat 750, 754-755, 74th Cong., 1st Sess., ch. 641, August 24, 1935, codified at 7 U.S.C.A. § 608c(5).

Minimum prices fixed in such orders are required to be uniform as to all handlers, subject to adjustments for differences in the grade and quality of the milk delivered, for differences in transportation costs from the place at which delivery is made to the handler to the distributing or processing plant, and for volume, market, and production differentials customarily applied by handlers. The volume differential is a differential which is paid when the operations of several country plants are consolidated into one plant. The inconvenience which is caused to producers by closing up plants to which they have been delivering and requiring that all of their milk be handled by one plant, is compensated by an additional payment to the producers. The production differential is the differential which is paid to a producer, compensating him for keeping his farm and milk qualified for a city market even though his milk may actually be going into manufactured use. It is necessary to keep this supply of reserve milk available for periods in which consumption of milk goes up so that the effect is that the producers must keep their farm in the same condition as if they were shipping milk into the city every day. The production differential is a payment to the farmer for performing this function in the market.

The market differential is a differential which is given to the producer to compensate him for delivering his milk to a city market instead of to a country plant. These differentials vary with the markets and cannot be qualified as a "location" differential, because of the fact that location is usually determined on the distance from a

primary market whereas market differentials are usually paid in secondary markets.[24]

Changes to location adjustments are changes in prices, as reflected in the uniform prices received by milk producers, the farmers. The purpose of the amendments with which this case deals was to change pricing by the plant location adjustments to prices. (Finding 11) According to the Secretary, "the primary purpose of location adjustments continues to be to provide an incentive to move milk from the production area to the consumption center." (Finding 12) These incentives achieve attractiveness to the producers based on value increments. In a previous rulemaking decision, the Secretary wrote:

> Regardless of the pricing structure employed, the purpose of location adjustments is to reflect the cost of hauling milk from where it is produced to where it is needed for use in fluid milk products. The Class I and blend prices at major-city, base zone locations are intended to attract a sufficient supply of milk to such location. To the extent that plants are located some distance from the base zone, and closer to the major supply areas for the market, Class I and blend prices are reduced to reflect the lesser hauling costs that are incurred in supplying such plants relative to plants located in the base zone.... Thus, adjustments to Class I and blend prices reflect the cost of the economic service provided by producers to handlers at varying locations. The value of the service provided varies in terms of both distance and the cost of hauling bulk milk. The extent to

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[24] S.Rep. No. 1011, 74th Cong., 1st Sess., 10 (May 13, 1935); H.R. Rep. No. 1241, 74th Cong., 1st Sess., 9-10 (June 15, 1935). Also cited in *Borden, Inc., et al.*, 46 Agric. Dec. at 1392-1393.

> which there is adequate compensation for the value of services provided raises an issue of equity, both among producers and among handlers.[25]

And, in the most recent decision of the Department's Judicial Officer affecting location adjustments, *Farm Fresh, Inc.*, 49 Agric. Dec. _____, AMA No. M-106-2, slip op. at 5-6 (April 12, 1990), a citation from *Schepps Dairy, Inc, v. Bergland*, 628 F.2d 11, (D.C. Cir. 1979) was offered, including:

> Milk-producing regions covered by an order are often distant from consuming centers, and chief among the adjustments enumerated in the Act is one for "the locations at which delivery of... milk... is made to... handlers."*/ The location adjustment honors the fact that a handler who receives milk near consuming centers has a more valuable commodity than a handler who takes in milk in an area further out where it is produced cheaply, but who must undertake the burden of transporting the processed product to consumer markets.*/
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> */ Citations omitted.

These definitions generally describe location adjustments. However, the Secretary has specifically recognized that these are indeed integers in determining milk prices in the Southern Michigan Order for a conclusion was published that the complained-of amendments known as "...location pricing provisions..." would result in a price increase of at least $40,000 per month. (Finding 14)

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[25] 51 Fed. Reg. 40,176, 40,178 (November 5, 1986).

The Secretary's action fully displays a process which was described in *Borden, Inc., et al.*, 46 Agric. Dec. at 1402 as follows:

> The congressional report[26] shows that, notwithstanding the nationwide surplus milk situation, Congress was concerned with assuring, *through the price mechanisms of the milk marketing orders*, an adequate supply of milk for fluid use in deficit areas. The ALJ and petitioners criticize the Secretary's decision on the ground that there was no shortage of milk for fluid needs. But in the same factual setting, Congress expressed the view that the *price provisions of the milk orders*, including, the location adjustments, *should ensure that milk will be shipped to deficit areas*.
>
> * * * *
>
> Congress expressly stated in the report that the desired uniform prices to handlers and uniform payments to producers were not being achieved because the market order prices did not adequately reflect transportation costs. Congress further recognized in the report that those producers who assume the responsibility of supplying the needs of the market, i.e., the cooperatives, have to pay the transportation costs, resulting in the cooperative members not receiving the desired uniform prices. The same views are expressed in the Secretary's 1985 report at issue here.

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[26] Footnote added. This report, H.R. Rep. No. 271, 99th Cong., 1st Sess., pt. 1, at 24, 1985 U.S. Code Cong. Admin. News 1103, 1128, supported the Food Security Act of 1985, and the included amendment at 7 U.S.C.A. § 608c(5)(A).

> The general tenor of the congressional report is critical of the Secretary's failure to adequately reflect transportation costs in the Class I price differentials and location adjustments. This congressional report emasculates most of the objections by the ALJ and petitioners to the Secretary's final decision. (Emphasis in original)

The petitions herein present different facts than were encountered in *Borden Inc. et al.*, 46 Agric. Dec. 1315, for, here, it is the Secretary who, as the result of the rulemaking process, found a sufficient supply of milk in each zone, and who explicitly rejected 7 U.S.C.A. § 6O8c(18) as authority for his decision.

The Secretary's presently considered action has amended this milk marketing order in its location adjustment provisions. The reality of the Secretary's actions by recognizing location adjustments as part of the *pricing mechanism* was to change the prices of milk.[27] This conclusion is discerned by reference to the legislative authority from which the Secretary claims legitimacy. The Act specifically provides that "...prices shall be uniform... subject only to adjustments for...the locations at which delivery ...is made....[28] The fact that the Secretary's action reaches price changes is further displayed by the Secretary's rationale addressing: "...adjustments to prices..."; "...flatter Class I and uniform price structure..."; "...zone pricing structure...";

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[27] It is observed that the prices received for all milk sold to plants, Michigan, increased from $13.90/cwt. in September, 1989, the month these order changes became effective, to $16.00/cwt in December 1989, an increase of 15.1% in just 3 months. *Agricultural Prices, April, 1990.* Agricultural Statistical Board, N.A.S.S. U.S.D.A.

[28] 7 U.S.C.A. § 608c(5)(A).

"...misalignment of Class I prices..."; "... Class I price..."; "...higher price..."; "... fewer pricing zones..."; "... highly structured zone pricing..."; "...Lansing['s]...price...will be five cents higher..."; "...pricing equity...will continue..."; "...Alignment of prices..."; "...price alignment..."; "...price changes are not of sufficient magnitude"; "...change...to three pricing zones is not tied to the cost of moving milk"; "...new pricing structure will reflect...three pricing zones..."; "...results in Class I and uniform prices...that are too high..."; "...the blend prices...overstate the value of the milk to the Class I market..."; "... producers in the southern part of the state are subsidizing producer incomes in the Upper Peninsula..."; "...ideally, location adjustment rates...would provide Class I prices..."; "... location adjustment rate change will result in lower blend prices..."; "the only purpose for adopting the...rate is so that the value of milk at these distant locations will more nearly reflect the cost of moving milk (Findings 11, 12, 13) to the market."

Further, by describing the magnitude of location adjustments as a modifier of costs, i.e. "...an incentive to move milk...," (Finding 12) and by identifying location adjustments as pricing provisions which insure the shipment of milk to deficit areas, *Borden, Inc., et al.*, 46 Agric. Dec. at 1402, the Secretary has addressed a pricing system which looks to net results for the producer.[29] The Secretary's Judicial Officer reflects this policy, as follows:

> *Borden* sets forth the views of leading agricultural economists who are experts in the field of dairy

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[29] In a previous effort to amend the Michigan Order, the Secretary realized that producers direct their efforts to the attainment of the highest possible net prices. (38 Fed. Reg. 2,380 (January 24, 1973)).

marketing*/. The experts recognize the "principle of location economics"*/ and *"subscribe to the theory that these transportation differentials [location adjustments] be closely related to actual transport costs*"*/.[30] (Emphasis and bracketed material in original)

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*/ Citations omitted.

It is concluded that the location adjustments addressed in this case are cost-based pricing classifications required in the marketing of milk, authorized by the Act at 7 U.S.C.A. § 608c(5)(A)(3), primarily based on transportation variables, and on the relationships of the economic benefit exchange between the seller-producers and the buyer-handlers.

It then remains to discover the proper process by which milk prices are changed.[31]

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[30] *Farm Fresh Inc.*, 49 Agric. Dec. _____, AMA Docket No. M-106-2, slip op. at 54-55 (April 12, 1990).

[31] The Milk Pricing Advisory Committee, recognized in *Borden, Inc., et al.*, 46 Agric. Dec. at 1410, 1416 as a body of expert economists employed by the Department of Agriculture, in its published report to the Assistant Secretary, Milk Pricing Advisory Comm., U.S. Dep't of Agric., Milk Pricing Policy & Procedures—Part I, The Milk Pricing Problem, 6 (Mar. 1972) (referred to as Advisory Comm. Report), stated:

> Pricing objectives involve an application of general statutory language such as orderly marketing, public interest, adequate supply, parity prices, and the general statutory objectives implied therein to the problem of establishing class prices for milk. In addition, the Act provides specific guidance for the establishment of milk prices in Section 8c(18). General objectives must therefore be interpreted in light of this more specific language.

Congress did not provide the method of changing prices based on location in the 1935 Amending Act and did not do so until 1937.[32] The specific text of the presently codified Act is as follows:

> The Secretary of Agriculture, *prior to* prescribing any term in any marketing agreement or order, *or amendment thereto*, relating to milk or its products, if such term is to fix minimum prices to be paid to producers or associations of producers, or prior to modifying the price fixed in any such term, *shall ascertain the parity prices* of such commodities. The prices which it is declared to be the policy of Congress to establish in section *602 of this title* shall, for the purposes of such agreement, order, or amendment, *be adjusted to reflect the price of feeds, the available supplies of feeds*, and other economic conditions which affect market *supply and demand for milk or its products in the marketing area to which the contemplated marketing agreement, order, or amendment relates*. Whenever the Secretary finds, upon the basis of the evidence adduced at the hearing required by section 608b of this title or this section, as the case may be, that the parity prices of such commodities are not reasonable in view of the price of feeds, the available supplies of feeds, and *other economic conditions which affect market supply and demand for milk* and its products in the marketing area to which the contemplated agreement, order, or amendment relates, *he shall fix such prices as he finds will reflect such factors*, insure a sufficient quantity of pure and wholesome milk to meet current

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The committee's reference to the Act's specific guidance for the establishment of milk prices is to 7 U.S.C.A. § 608c(18).

[32] Agricultural Marketing Agreement Act of 1937, ch. 296, 50 Stat. 246, 247 (June 3, 1937).

needs and further to assure a level of farm income adequate to maintain productive capacity sufficient to meet anticipated future needs, and be in the public interest. Thereafter, as the Secretary finds necessary on account of changed circumstances, he shall, after due notice and opportunity for hearing, make adjustments in such prices.[33] (Emphasis added)

The legislative report associated with this statute in part was as follows:

Section 2(f) of the bill adds to section 8(c) of the Agricultural Adjustment Act two new subsections. The first deals with milk prices. Milk is the only commodity for which producer prices for interstate milk may be fixed by the Secretary of Agriculture through orders under the Agricultural Adjustment Act. The necessity for price regulation in the case of milk has also been recognized by many States which have established milk boards to fix producer prices for intrastate milk, and the validity of such State regulation has been upheld by the Supreme Court *(Nebbia v. New York (1934), 291 U.S. 502). Marketing agreements and orders for milk ordinarily involve pooling and price plans which, to be effective, must continue with the up and down swings of economic*

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[33] 7 U.S.C.A. § 608c(18). The "section 602" to which reference is made in this amendment is 7 U.S.C. § 602. The numerical citation in the enrolled bill is "2 of this title." The section 608(b) to which reference is made is 7 U.S.C. § 603(b). Congress' inclusion of "parity" pricing was a feature added in 1948, (Agriculture Act of 1948, ch. 827, Title III, Sec. 302, 80th Cong., 2nd Sess., 1948 U.S. Code Cong. Ser. Vol. I, 948-9) and reaffirmed in 1985 (H.R. Rep. 99-271, Part 1, 1985 U.S. Code Cong & Admin. News 1297). See *Lehigh Valley Cooperative Farmers, Inc. v. U.S.*, 370 U.S. 76, (Black dissent) 102-3, 82 S. Ct. 1168, 1182-3, 8 L.Ed.2d 345 (1962).

factors which relate to price. The proposed amendment recognizes this, and provides that if the Secretary finds that the national parity price for milk does not adequately reflect the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk in the marketing area to which the marketing agreement or order relates, he shall fix such prices as will reflect such factors, insure a sufficient quantity of pure wholesome milk, and be in the public interest. The proposed amendment further provides that as the Secretary finds necessary on account of changed circumstances, he shall make adjustments in such prices. Such adjustments are to be made in accordance with the same standards as are provided for the initial fixing of prices under this subsection.[34] (Emphasis added)

This 1937 report reveals that the Congress intended the Secretary to adjust milk prices based upon those changes in economic conditions as are affected by supplies of essential ingredients required for the production of milk, as well as the demand for the end product, and that such adjustments are to be obtained in the individual marketing areas "...in accordance with the same standards as are provided for the initial fixing of prices under this subsection."

In its report supporting the Food Security Act of 1985, the Agriculture Committee of the House of Representatives reminded the Secretary "...the Secretary generally should not substitute his judgement for that of the industry in how best to market a crop." This same committee, and at the same page, observed that the Act, at 7 U.S.C.A. § 608c(2):

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[34] H.R. Rep. No. 468, 75th Cong., 1st Sess. 3.

> ... [P]rovides for the continuation of marketing orders to avoid unreasonable fluctuations in supplies and prices detrimental to consumers and producers when the price on a regulated commodity exceeds parity.[35]

The Secretary has at the ready,[36] the raw economic data which would support the supply and demand analysis envisioned by the Congress; indeed, the Congress itself relied on that very data in writing the 1985 Amendment to the Act.[37]

The Secretary is familiar with the processes of economic analyses and displayed the sophistications associated with supply-side considerations in advancing previous amendments to prices in Order 40. Reference is made to the Secretary's

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[35] H.R. Rep. No. 99-271, pt. 1, at 193 reprinted at 1985 U.S. Code Cong. Admin. News 1297. In spite of this Congressional mandate, the Secretary has continued the practice recognized in 1963, *U.S. v. Mills*, 315 F.2d 828, 832.3 (4th Cir. 1963) *reh'g denied*, 317 F.2d 764, *cert. denied*, 374 U.S. 832, 83 S. Ct. 1874, 10 L.Ed.2d 1054, *cert. denied*, 375 U.S. 819, 84 S. Ct. 57, 11 L.Ed.2d 54, by which parity prices are declared as being unreasonable, even though no supply-demand analysis is displayed.

[36] See for example: *Economics of the Farm Sector, Costs of Production*, 1985, *et seq*. Serial, National Economics Division, Economics Research, U.S. Department of Agriculture, Washington, D.C.

[37] The Secretary's Milk Marketing Orders are but one facet of milk industry regulation. Another is the price support program which the Congress recognizes should utilize a supply-demand adjuster to achieve realistic pricing levels. H.R. Rep. No. 99-271, Part 1, 1985 U.S. Code Cong. & Admin. News 1458-63. This program is exempted from the rulemaking requirements of the Administrative Procedure Act, Pub. L. 99-198, Sec. 102, Dec. 23, 1985, 99 Stat. 1366 (7 U.S.C. § 1446 Note).

decision of April 15, 1968,[38] which considered in part, amendments to location differentials in Order 40. The Secretary, at that time, in the consideration of a supply-demand analyses, detailed the location value of milk at the handlers' plants in relation to that value at competitors' plants.[39] The relationship of the handlers' location pricing, the net returns to producers based on pricing, the establishment of location adjustments based on a scale of location pricing decreasing from the major population centers,[40] handlers' supply competition, and identification of areas of future supply to major markets affected by direct-shipments to those markets were areas of future supply to major markets affected by direct-shipments to those markets were also considered.[41] Additionally, it was recognized that location differentials are to provide for the milk needs in the metropolitan areas at the producers' lowest possible hauling cost and at the lowest reserve hauling cost, that location adjustments are used to obtain level costs in supply competition and that location adjustments are to protect the price received by producers in their reserve diversions. The Secretary also recognized that the effects of zone alignments are known to include the price of procurement, as the handlers compete for supplies.[42] The Secretary's rationale displayed a disinclination to rezone based upon prices paid by competing handlers after consideration of transportation costs, thereby

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38 33 Fed. Reg. 6,027 (April 19, 1968).

39 *Id.* at 6028.

40 *Id.* at 6029.

41 *Id.* at 6030.

42 *Id.* at 6030.

reflecting a concern with the net costs of supply competition.[43]

The Secretary has not considered similar issues in the presently considered amendments, but also, has stated that statutory authority providing for such analyses would not be applied. This change of policy was not explained, thereby snubbing a principle expressed in *A.T.&T. v. FCC*, 836 F.2d 1386, 1392-3, (D.C. Cir. 1988) citing *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 723, 91 S. Ct. 2229, 29 L.Ed.2d 701 (1971): "...then to the extent that it is 'changing its course [,it] must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored...'"

In the Secretary's amending action in the Southern Michigan Order, the record is devoid of the economic analysis which might support the increase of prices[44] to the producers in the magnitude of $40,000 per month, (Finding 14) considering the Secretary's conclusions that in each of the three newly established zones, the supply of milk was in "...good balance....", "...self-sufficient...." and in "...plenty...." (Finding 17) This result is discredited by the

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[43] *Id.* at 6031.

[44] The Secretary, by avoiding this analysis may also have avoided other strictures, at the price support section of the 1985 Food Security Act Pub. L 99-198, Sec. 101, 99 Stat. 1363. See 7 U.S.C.A. § 1446 (d)(2)(A), 3(A)(i), 3(B). The legislative history reveals that: "The Secretary would be required to provide for a reduction in the price of milk received by producers, applicable to all milk marketed for commercial use, during any fiscal year that a milk diversion program is in effect." H.R. Rep. No. 99-271, Part 1, 1985 U.S. Code Cong. & Admin. News 1306. The milk diversion program was in effect during 1989; 7 U.S.C.A. § 1446(d)(3)(B); 7 C.F.R. § 1430.450 (1990).

simple and rudimentary economic theories of Adam Smith[45] who recognized the relationship of intrinsic and perceived values, and suggested that the demand, and hence consumption of any good, is increased upon a reduction of its price, rather than upon an increase of price, as was obtained here. Since location adjustments are intended to stimulate the movement of milk into deficit areas, *Walmsley v. Block*, 719 F.2d 1414 (8th Cir. 1983) the actual increase of location adjustments rates is not appropriate in areas of supply equilibrium. Therefore, considering the results, the Secretary, even upon a finding that the amended prices would reflect supply and demand factors, (Finding 9) in fact, confounded any analyses, which might support that finding, since the methodology by 7 U.S.C.A § 608c(18) was specifically rejected by the

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[45] Smith, Adam, *An Inquiry into the Nature and Causes of the Wealth of Nations* (March 9, 1776); Cropsey, *Polity and Economy; An Interpretation of the Principles of Adam Smith*, Archival ed. LC 76-56126 1977, repr. of Nijoff 1957 (Greenwood).

Secretary.[46] Special recollection is made of the Secretary's following language:

> Section 8c(18) is the authority for the Secretary to change the Class I differential if supply and demand warrants a change in order to increase or decrease milk production. The *authority for the Secretary to provide for pricing*

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[46] The Secretary's Judicial Officer has not addressed the constraints of 7 U.S.C.A. § 608c(18) in these circumstances. The Judicial Officer, however, did observe in *Borden, Inc., et al.*, 46 Agric. Dec. at 1456, 1460 that the Secretary has perpetually found parity prices "...unreasonable ...," (see Finding 9) and has consistently ignored parity prices as a standard in determining order prices. However, H.R. Rep. No. 1241, 74th Cong., 1st Sess. 3 (June 15, 1935) supporting the 1935 Act, stated "...the act confers no authority upon the Secretary to utilize his powers in order to maintain farm prices above the parity level."

The Milk Pricing Advisory Committee, Advisory Comm. Report, p. 7, stated:

> While parity prices are established as the general goal of the Act, parity prices have never been considered an adequate standard in determining Federal order prices. Section 8c(18) recognizes this by spelling out more specific objectives for fluid milk priced under orders.
>
> There are several reasons parity prices have not been an appropriate measure for use in establishing Class I prices under milk orders:
>
> 1. The parity price for milk is a national parity whereas prices under milk orders pertain to various areas of the country. These different areas have vastly different production conditions and supplydemand conditions. Variation also exists in the appropriate levels of price for different areas. In some markets the national parity price would be too high and in other markets it would be too low.

> *zones (location adjustments) in an order is found in section 8c((5)(A)* of the Act. (Finding 21) (Emphasis added)

Even if the Secretary were to claim 7 U.S.C.A. § 608c(18) as a basis for the present amendments, the apparent results, increased prices in spite of supply equilibrium, would waste the supply-demand analyses required by Congress, which expressed itself in these words:

> It is declared to be the policy of Congress—
>
> > (1) Through the exercise of the powers conferred upon the Secretary of Agriculture under this chapter, to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish, as the prices to farmers, parity prices as defined by section 1301(a)(1) of this title.
> >
> > (2) To protect the interest of the consumer by (a) approaching the level of prices which it is declared to be the policy of Congress to establish in subsection (1) of this section by gradual correction of the current level at as rapid a rate as the Secretary of Agriculture deems to be in the public interest and feasible in view of the current consumptive demand in domestic and foreign markets, and (b) authorizing no action under this chapter which has for its purpose the maintenance of prices to farmers above the level

> which it is declared to be the policy of Congress to establish in subsection (1) of this section.[47]

Hence, the Secretary, having found that parity prices were unreasonable, (Finding 9) did not pursue the supply-demand analyses which might authorize "...the maintenance of prices to farmers above the level which it is declared to be the policy of Congress to establish...."[48]

Accordingly, petitioner's argument[49] that the Secretary's amendment was not reflective of the supply and demand analyses required by the Act has clear merit, comporting with *Borden Inc., et al.*, 46 Agric. Dec. at 1459, 1461:

> First, as to the Secretary's duty, § 8c(18)) of the Act (7 U.S.C. § 608c(18)) requires the Secretary to set milk prices, including location adjustments, at a level that will, by themselves, "insure" a sufficient quantity of milk, now and in the future.
>
> * * * * *
>
> Accordingly, the Secretary is required by § 8c(18) of the Act to make certain that the Class prices and location

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[47] 7 U.S.C.A. § 602. This language, original to the 1935 Act, 49 Stat. 750, 751, 74th Cong., 1st Sess., ch. 641 has not been amended or obliterated by the Congress.

[48] 7 U.S.C.A. § 602(2)(b). This plain statutory language should not be diminished by that found in H.R. Rep. No. 1241, 74th Cong., 1st Sess., pt. 7 (June 15, 1935) which reads: "The essential purpose of these agreements and licenses [marketing orders] has, however, always been to raise producer prices."

[49] Attention is directed to petitioners' brief filed October 31, 1989, pp. 43-49 and to the reply brief filed May 1, 1990, pp. 20-21.

adjustments in every milk order are high enough to attract milk to every part of a marketing area.

Economic Benefits

Petitioners present another argument suggesting that the Secretary's amendments do not comport with the law. This argument is based on the precedent that amendments to location adjustments may not be legal if such are not related to economic benefits obtained by milk handlers. The exposition of this theory was most recently presented by the Department's Judicial Officer in *Farm Fresh, Inc.*, 49 Agric. Dec. _____, AMA Docket No. M-106-2, slip op. at 55-56 (April 12, 1990) as follows:

> Borden analyzes all of the relevant court decisions involving location adjustments (46 Agric. Dec. at 1468-151 1; slip op. at 204-70). *Borden* quotes from *Fairmont Foods Co. v. Hardin*, 442 F.2d 762, 767 (D.C. Cir. 1971), explaining that a location adjustment fitting literally within the definition of a location adjustment is not valid unless there is a relation between the price differential and economic benefit, as follows: (46 Agric. Dec. at 1475-76; slip op. at 215-16):
>
> To summarize and emphasize, the regulatory scheme results in uniformity among the handlers covered by a milk marketing order, with additional economic burdens being permitted only for economic reasons, to "compensate or reward the producer for providing an economic service of benefit to the handler." *Zuber, supra, at 184, 90. S.Ct. at 323.* This is a sound objective of governmental regulation, and one which the courts are and should be vigilant to preserve. It is for that reason that Zuber requires the Secretary to demonstrate, as a prerequisite to imposing the burden of price differentials

on handlers, that the burden is imposed for the purpose of reflecting an economic service of benefit to the handler.[23]

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[23] The Secretary argues, among other things, that the differentials set by this order are based on the "locations at which delivery * * * is made to * * * handlers," and thus fit within the literal definition of a location adjustment permitted by the Act. 7 U.S.C. § 608c(5)(A)(3). We cannot agree, however, that a mere difference in location is sufficient reason to require one handler to pay higher prices than another governed by the same Order. There must still be some relation between the price differential and economic benefit.

The *Zuber* case to which reference was made, is *Zuber v. Allen*, 396 U.S. 168, 90 S. Ct. 314, 24 L.Ed. 345 (1969) in which the following language is expressed at 184:

> The congressional purpose is further illumined by the character of the other statutory differentials for "volume," "grade or quality," "location," and "production,"[*/] all of which compensate or reward the producer for providing an economic service or benefit to the handler.[*/]

[*/] Footnote omitted.

The Department's Judicial Officer has commented on the *Zuber* case, as follows.[50]

> The Supreme Court has recognized that the statutory differentials to uniform prices, including location

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[50] *Borden, Inc., et al.*, 46 Agric. Dec. at 1398.

adjustments, are to "compensate or reward the producer for providing, an economic service of benefit to the handler." *Zuber v. Allen*, 396 U.S. 168,1 83-84(1969)(§ VII(A), *infra*). *Accord Schepps Dairy, Inc. v. Bergland*, 628 F.2d 11, 18 (D.C. Cir. 1979)(§ VII(F), *infra*); *Borden, Inc. v. Butz*, 544 F.2d 312, 316 (7th Cir. 1976) (§ VII(E), *infra*); *Sunny Hill Farms Dairy Co. v. Hardin*, 446 F.2d 1124, 1128-29 (8th Cir. 1971) (§ VII(D), *infra*); *Fairmount Foods Co. v. Hardin*, 442 F.2d 762, 766-67 (D.C. Cir. 1971)(§ VII(C), *infra*).

It is the holding of *Borden, Inc., et al.*, 46 Agric. Dec. at 1394-1395, 1398 that location adjustments are appropriate if such compensate producers for delivering milk to an extremely deficit area, it being sufficient if milk is priced according to its location value.

The Secretary's acceptance of this principle has been demonstrated not only through the Judicial Officer's expressions, but also by the Secretary's own expression in the modifications of other orders: 'Thus, adjustments to Class I and blend prices reflect the cost of the economic service provided by producers to handlers at varying locations."[51]

In this matter, petitioners Lansing and Liberty contend,[52] and by their arguments have established, that since the Secretary has found balanced supply and consumption in Zone 1, "plenty" of milk in Zone II, and self-sufficiency in Zone III (Finding 17) there is no reason to compensate producers for providing transportation services to handlers in areas where

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[51] 51 Fed. Reg. 40,176, 40,178 (November 5, 1986).

[52] Attention is directed to petitioners' brief filed October 31, 1989, 42-43; Petitioners' reply brief filed May 1, 1990, 12-13, 21.

milk is not needed. Hence, there is no economic benefit to these two handlers, and pursuant to *Zuber*, the amending adjustments do not have legality.

Classification System

A further argument advanced by petitioner Frigo,[53] also has merit. This relates to the frustration of the Act's classification system[54] upon the adoption of the Secretary's amendment at 7 C.F.R. § 1040.52(a)(2). This amendment changed the location adjustment rate on the computation of Class I and uniform price differentials from 1¢ to 2.25¢ per hundredweight per 10 miles on shipments from plants in areas beyond the three specific zones to the zones' borders. The rate was adopted because the lower rate (1¢),

> ...results in Class I and uniform prices at the various locations that are too high relative to the prices of milk in the marketing area because the rate does not reelect the cost of hauling milk. The record indicates that it costs about 2.25¢ per hundredweight per 10 miles to move milk within Michigan, and 3.6 cents or more to move milk into Michigan from plants outside Michigan.[55]

Additionally,

> The current location adjustment rate of 1¢ per hundredweight per 10 miles seriously overstates the value

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[53] Attention is directed to petitioners' brief filed October 31, 1989, 46-49, petitioners' reply brief filed May 1, 1990, 21-25.

[54] 7 U.S.C.A. § 608(c)(5)(A),(B).

[55] 54 Fed. Reg. 26,777 (June 26, 1989).

> of milk to the Southern Michigan Pool at locations considerably distant from the central market.[56]

Since an increase in location adjustments results in a decrease in prices received by producers, this expression muddles that which had been previously advanced:

> The primary purpose of location adjustments continues to be to provide an incentive to move milk from the production area to the consumption center.[57]

The amendment was reached following consideration of testimony by the proponent,(PEC) advanced in support of this specific change. The Secretary's report of this testimony was, in part, as follows:

> The proponent's witness said that other examples of blend price differences could be demonstrated and that this degree of price difference creates disorderly market conditions. He said that this much of a difference in price creates an incentive for distant milk supplies to attempt to become pooled in a market with a higher Class I utilization while the supplier has no desire to supply the fluid market that is generating the higher blend price. *Such activities, he said, dilute the returns from the Class I market for other producers who are actively involved in supplying the Class I and Class II processors.*[58] (Emphasis added)

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[56] Id.

[57] Id. at 26,775.

[58] Id. at 26,776.

These facets of the rulemaking record must be read in conjunction with the statements of the Department's counsel, advarced with petitioners' amended complaint. These post-hearing statements were offered in oral argument on a motion for preliminary injunctive relief in *Lansing Dairy, Inc., et al., v. Yeutter*, Western District of Michigan No. L-89-30080 CA (September 21, 1989),[59] an action initiated by petitioners, who complained[60] that the Secretary's amendment as described in the present petition, resulted in irreparable injury. These parole statements of the Secretary's counsel explain that the amendments addressed by petitioner Frigo,[61] were adopted to assure supplies of milk for Class I use, that approximately 97% of Frigo's milk purchases are utilized in the production of a Class III product, cheese, that as a result Frigo has drawn over one million dollars annually from the order's pool to pay its milk producers and that the Secretary's amendment corrected this "free-rider" situation.

Considering these statements of the Government's counsel, the Secretary's own rationale and receipt into the rulemaking record of the testimony of the proponent's witness which was considered and reported by the Secretary as

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[59] Certified copies of portions of the transcript of counsel's statements were filed herein on April 20, 1990. The Department's Judicial Officer has recently accepted and adopted the post-hearing statements of the Department's counsel as being interpretive and expositive of the rulemaking rationale in obtaining amendments to a milk order. *Farm Fresh, Inc.*, 49 Agric. Dec. _____, AMA Docket No. M-106-2, slip op. at 63-68 (April 12, 1990).

[60] It appears that this motion was denied, pending the exhaustion of petitioners' administrative remedies.

[61] Attention is directed to the memorandum of points and authorities in support of petitioners' motion for leave to amend petition, filed January 29, 1990.

relevant evidence and the unanswered allegations of Frigo (Finding 16), it is appropriate to confirm that the entire purpose of milk marketing orders is achieved by country handlers who stand ready to interrupt their production of cheese or butter, so that milk required for those purposes may be diverted into Class I use in the cities. In this matter, it is apparent that the Secretary was of the opinion that Frigo's contribution of but three percent of its production was not worth the amount of money which Frigo was entitled to claim from the pool. But, the correction of this distribution pattern could not be legally achieved by the method selected, for in *Blair v. Freeman*, 370 F.2d 229, 237-239 (D.C. Cir. 1966) and *Zuber v. Allen*, 402 F.2d 660, 663 (D.C. Cir. 1968), *aff'd* 396 U.S. 168 (1969) it was declared that:

> [T]he Act forbids consideration of the use to which the milk of a particular producer or class of producers is put, historically or potentially, in adjusting the uniform minimum price to be paid to such producers.

This precept, as it was applied in both the *Blair* and *Zuber* cases to interpreting the Act at 7 U.S.C.A. § 608c(5) shall also be applied herein.

Conclusion

In summary, although the Secretary has advanced reasons to support the amendment to 7 C.F.R. § 1040.52(a)(1), as being population shifts, plant closing and increased milk production and to 7 C.F.R. § 1040.52(a)(2), as being an increase of transportation costs, and would thereby claim compliance with *Motor Vehicle Mfrs. Ass'n. v, State Farm Mut.*, 463 U.S. 29, 103 S. Ct. 2856, 77 L.Ed. 2d 443, the Secretary's amendments do not comport with the authority granted by the Act.

Amendments to location adjustments are price changes, and as such, must be obtained pursuant to the processes dictated by the Act as it was written in 1937. These process are described at 7 U.S.C. § 608c(18), authority eschewed by the respondent, and require that economic analyses of the supply and demand features of the market be considered. Additionally, the amendments as they affect petitioners Lansing and Liberty are deficient in that there is lacking a display of economic benefit to them. Further, the amendments as they affect petitioner Frigo are illegal for they are based on classification discriminations.

Therefore, based on the foregoing, the amendments are illegal.

Order

Upon consideration of all arguments raised by the petition herein, it is the initial decision of the administrative law judge that respondent's action in amending 7 C.F.R. § 1040.52(a)(1) and (2), as herein described, was not in accordance with the law.

It is hereby ordered that all monies of which petitioners have been deprived as a result of these illegal amendments, shall be returned to the petitioners, with interest.[62]

Appeals may be entered within 30 days after service of this decision and order, as provided at 7 U.S.C.A. § 900.65.

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[62] Interest is awardable pursuant to *Cumberland Farms, Inc. v. Lyng*, Civil No. 88-2406 (D.N.J. July 18, 1989), 1989 WL 85062, based on 1989 WL 52697, reversing *Cumberland Farms Food Stores, Inc.*, 47 Agric. Dec. 809 (May 10, 1989).

In the event appeals are not filed, this Initial Decision and Order shall become final without further proceedings 35 days after the date of service upon the respondent.

Copies of this Initial Decision and Order shall be served upon the parties and counsel, including counsel to PEC.

s/ Paul Kane
PAUL KANE
Administrative Law Judge

July 12, 1990

APPENDIX E

FILED
JAN 23 1995
LEONARD GREEN, CLERK

Nos. 92-2231/2232/2233/2448/2449

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LANSING DAIRY, INC., ET AL. (92-2231/2232)	)	
Plaintiffs-Appellants/ Cross-Appellees,	)	
MANITOWOC MILK PRODUCERS ASSOCIATION (92-2232),	)	
Intervenor Plaintiff-Appellant/Cross-Appellee,	)	
v.	)	ORDER
MIKE ESPY, SUCCESSOR TO EDWARD R. MADIGAN, SECRETARY OF AGRICULTURE (92-2448/2449),	)	
Defendant-Appellee/ Cross-Appellant,	)	

PRODUCERS EQUALIZATION)
COMMITTEE (92-2233),)
)
Intervenor Defendant-)
Appellee/Cross-Appellant.)

BEFORE: CELEBREZZE, MARTIN, and BATCHELDER, Circuit Judges.

The court having received two petitions for rehearing en banc, and the petitions having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petitions for rehearing have been referred to the original hearing panel.

The panel has further reviewed the petitions for rehearing and concludes that the issues raised in the petitions were fully considered upon the original submission and decision of the case. Accordingly, the petitions are denied.

ENTERED BY ORDER OF THE COURT

s/Leonard Green
Leonard Green, Clerk /pe

APPENDIX F

1. Section 608c(5) of Title 7, United States Code, provides, in part:

> In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section) no others:
>
> (A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers. Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers. Throughout the 2-year period beginning on the effective date of this sentence (and subsequent to such 2-year period unless modified by amendment to the order involved), the minimum aggregate amount of the adjustments, under clauses (1) and (2) of the preceding sentence, to prices for milk of the highest use classification under orders that are in effect under this section on the date of the enactment of the Food Security Act of 1985 [enacted Dec. 23, 1985] shall be as follows:

Marketing Area Subject to Order	Minimum Aggregate Dollar Amount of Such Adjustments Per Hundredweight of Milk Having 3.5 Percent Milkfat
* * * * *	
Southern Michigan.....	1.75
* * * * *	

Effective at the beginning of such two-year period, the minimum prices for milk of the highest use classification shall be adjusted for the locations at which delivery of such milk is made to such handlers.

(B) Providing:

(i) for the payment to all producers and associations of producers delivering milk to the same handler of uniform prices for all milk delivered by them:

* * *

* * * or

(ii) for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered;

subject, in either case, only to adjustments for (a) volume, market, and production differentials customarily applied by the handlers subject to such

order, (b) the grade or quality of the milk delivered, (c) the locations at which delivery of such milk is made, * * * *.

2. Section 608c(18) of Title 7, United States Code, provides:

> The Secretary of Agriculture, prior to prescribing any term in any marketing agreement or order, or amendment thereto, relating to milk or its products, if such term is to fix minimum prices to be paid to producers or associations of producers, or prior to modifying the price fixed in any such term, shall ascertain the parity prices of such commodities. The prices which it is declared to be the policy of Congress to establish in section 602 of this title shall, for the purposes of such agreement, order, or amendment, be adjusted to reflect the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk or its products in the marketing area to which the contemplated marketing agreement, order, or amendment relates. Whenever the Secretary finds, upon the basis of the evidence adduced at the hearing required by section 608b of this title or this section, as the case may be, that the parity prices of such commodities are not reasonable in view of the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk and its products in the marketing area to which the contemplated agreement, order, or amendment relates, he shall fix such prices as he finds will reflect such factors, insure a sufficient quantity of pure and wholesome milk to meet current needs and further to assure a level of farm income adequate to maintain productive capacity sufficient to

meet anticipated future needs, and be in the public interest. Thereafter, as the Secretary finds necessary on account of changed circumstances, he shall, after due notice and opportunity for hearing, make adjustments in such prices.

3. Section 1040.50 of Title 7, Code of Federal Regulations, provides:

§ 1040.50 Class prices.

Subject to the provisions of § 1040.52, the class prices for the month per hundredweight of milk containing 3.5 percent butterfat shall be as follows:

(a) *Class I price*. From the effective date hereof through April 30, 1988, and thereafter until amended, the Class I price shall be the basic formula price for the second preceding month plus $1.75.

(b) *Class II price*. The Class II price shall be computed by the Director of the Dairy Division and transmitted to the market administrator on or before the 15th day of the preceding month. The Class II price shall be the basic Class II formula price computed pursuant to § 1040.51a for the month plus the amount that the value computed pursuant to paragraph (b)(1) of this section exceeds the value computed pursuant to paragraph (b)(2) of this section, plus any amount by which the basic Class II formula price for the second preceding month, adjusted pursuant to paragraphs (b)(1) and (F)(2) of this section, was less than the Class III price for the second preceding month.

(1) Determine for the most recent 12-month period the simple average (rounded to the nearest cent) of the basic formula prices computed pursuant to § 1040.51 and add 10 cents; and

(2) Determine for the same 12-month period as specified in paragraph (b)(1) of this section the simple average (rounded to the nearest cent) of the basic Class II formula prices computed pursuant to § 1040.51a.

(c) *Class III price.* The Class III price shall be the basic formula price for the month.

(d) *Class III-A price.* The Class III-A price for the month shall be the average Central States nonfat dry milk price for the month, as reported by the Department, less 12.5 cents, times an amount computed by subtracting from 9 an amount calculated by dividing .4 by such nonfat dry milk price, plus the butterfat differential times 35 and rounded to the nearest cent.

4. Section 1040.52 of Title 7, Code of Federal Regulations, provides in part:

§ 1040.52 Plant location adjustments for handlers.

(a) For producer milk received at a pool plant and classified as Class I milk without movement in bulk to another pool plant and for which a location adjustment is applicable, the Class I price computed pursuant to § 1040.50(a) shall be reduced pursuant to paragraph (a)(1) or (2) of this section on the basis of the applicable rate per hundredweight for the location of such plant.

(1) *Zone rates.* For a plant located within the following described territory, including the cities located therein, the applicable zone rates shall be as follows:

MICHIGAN COUNTIES

Zone I—No Adjustments

Clinton, Genesee, Gratiot, Hillsdale, Huron, Ingham, Jackson, Lapeer, Lenawee, Livingston, Macomb, Monroe, Oakland, Saginaw, Sanilac, St. Clair, Shiawassee, Tuscola, Washtenaw and Wayne.

Bay (except Gibson, Mount Forest, Pinconning, Garfield and Fraser Townships).

Zone II—5 Cents

Allegan, Barry, Berrien, Branch, Calhoun, Cass, Eaton, Ionia, Kalamazoo, Kent, Montcalm, Muskegon, Ottawa, St. Joseph and Van Buren.

Zone III—7 Cents

Bay (all townships excluded from Zone I), Alcona, Alpena, Antrim, Arenac, Benzie, Charlevoix, Cheboygan, Clare, Crawford, Emmet, Gladwin, Grand Traverse, Isabella, Iosco, Kalkaska, Lake, Leelanau, Manistee, Mason, Missaukee, Mecosta, Midland, Montmorency, Newago, Oceana, Ogemaw, Osceola, Oscoda, Otsego, Presque Isle, Roscommon and Wexford.

(2) *Mileage rate.* For any plant at a location outside the territory specified in the preceding paragraph (a)(1) of this section, the applicable adjustment rate per hundredweight shall be based on the shortest highway distance between the plant and the nearest point in such territory as determined by the market administrator, and shall be the amount of

the zone differential applicable at such point plus 2.25 cents for each 10 miles or fraction thereof from such point.

5. Section 1040.61 of Title 7, Code of Federal Regulations, provides:

> **§ 1040.61 Computation of uniform prices for base milk and excess milk (including uniform price and adjusted uniform price).**
>
> For each month the market administrator shall compute:
>
> (a) The 3.5-percent value of all milk by:
>
> (1) Combining into one total the values computed pursuant to § 1040.60 for all handlers who filed the reports prescribed by § 1040.30 for the month and who made the payments pursuant to § 1040.71 for the preceding month;
>
> (2) Adding the aggregate of the values of the applicable location adjustments pursuant to § 1040.75(a)(1); and
>
> (3) Adding not less than one-half of the unobligated balance in the producer-settlement fund.
>
> (b) A uniform price as follows:
>
> (1) Divide the aggregate value computed pursuant to paragraph (a) of this section by the sum of the following:
>
> (i) The total hundredweight of producer milk; and
>
> (ii) The total hundredweight for which a value is computed pursuant to § 1040.60(f); and
>
> (2) Subtract not less than six nor more than 7 cents from the price computed pursuant to paragraph (a) of this section.

6. Section 1040.73 of Title 7, Code of Federal Regulations, provides in part:

§ 1040.73 Payments to producers and to cooperative associations.

(a) Except as provided by paragraph (b) of this section, on or before the 15th day of each month, each handler (except a cooperative association) shall pay each producer for milk received from him during the preceding month, not less than an amount of money computed by multiplying the total pounds of such milk by the applicable uniform prices computed pursuant to § 1040.61 adjusted by the location and butterfat differentials pursuant to §§ 1040.75 and 1040.74, respectively, less the payment made pursuant to paragraph (d) of this section and any proper deductions authorized by the producer. If by such date such handler has not received full payment for such month pursuant to § 1040.72 he may reduce such payments uniformly per hundredweight for all producers, by an amount not in excess of the per hundredweight reduction in payment from the market administrator; however, the handler shall make such balance of payment to those producers to whom it is due on or before the date for making payments pursuant to this paragraph next following that on which such balance of payment is received from the market administrator.

(b) Upon receipt of a written request from a cooperative association which the Secretary determines is authorized by producers to collect payment for their milk and receipt of a written promise to reimburse the handler the amount of any actual loss incurred by him because of any improper claim on the part of the association, each handler

shall pay to the cooperative association on or before the second day prior to the end of the month an amount equal to the payments authorized pursuant to paragraph (d) of this section, and on or before the 13th day of each month, in lieu of payments pursuant to paragraph (a) of this section, an amount equal to the gross sum due for all such milk received from certified producers, less amounts owed by each such producer to the handler for supplies purchased from him on prior written order or as evidenced by a delivery ticket signed by the producer.

(1) Each handler shall submit to the cooperative association written information on or before the sixth working day of each month which shows for each such producer:

(i) The total pounds of milk received from him during the preceding month;

(ii) The total pounds of butterfat contained in such milk;

(iii) The number of days on which milk was received; and

(iv) The amounts withheld by the handler in payment for supplies sold;

(2) A copy of each such request, promise to reimburse and certified list of producers shall be filed simultaneously with the market administrator by the association and shall be subject to verification at his discretion, through audit of the records of the cooperative association pertaining thereto. Exceptions, if any, to the accuracy of such certification by a producer, or by a handler shall be made by written notice to the market administrator, and shall be subject to his determination; and

(3) The foregoing payment and the submissions of information pursuant to paragraph (b)(1) of this section shall be made with respect to milk of each

producer whom the cooperative association certifies is a member or has authorized such cooperative association to collect for his milk, which is received on and after the first day of the month next following receipt of such certification through the last day of the month next preceding receipt of notice from the cooperative association of a termination of certification or until the original request is rescinded in writing by the association.

7. Section 1040.75 of Title 7, Code of Federal Regulations, provides:

§ 1040.75 Plant location adjustments for producers and on nonpool milk.

(a) Subject to the conditions of paragraph (b) of this section, in making payments to producers or cooperative associations pursuant to § 1040.73 each handler:

(1) May deduct for milk to be paid for at the uniform price the rate per hundredweight applicable pursuant to § 1040.52(a) (1) or (2) for the location of the plant at which the milk was first physically received.

(2)[Reserved]

(3) Shall add not less than 10 cents per hundredweight with respect to milk received from producers and cooperative associations pursuant to § 1040.9(c) at a pool plant located within the Michigan counties of Macomb, Oakland, and Wayne.

(b) When milk of an individual producer is physically received at more than one location (including any nonpool plant) during the month, the location adjustment rate shall be the weighted average (rounded to the nearest one-half cent) of the amounts

computed for the respective locations, except that if 65 percent or more of such producer's milk is delivered to a plant or plants at which the same rate is applicable, such rate shall be applicable to all deliveries of such producer during the month regardless of point of delivery.

(c) For purposes of computation pursuant to §§ 1040.71 and 1040.72, the uniform price shall be adjusted at the rates set forth in § 1040.52 applicable at the location of the nonpool plant from which the other source milk was received except that the uniform price by such adjustment shall not be less than the Class III price.

Supreme Court, U.S.
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(2)

No. 94-1734

In The
Supreme Court of the United States
October Term, 1994

LANSING DAIRY, INC., *et al.*,
Petitioners
v.

DAN GLICKMAN,
SECRETARY OF AGRICULTURE, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENTS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) requires substantial judicial deference to an agency's reversal of its longstanding interpretation of a statute that it administers, where the agency has neither acknowledged that it changed its mind nor provided a reasoned explanation for the change.

2. Whether a court, in applying *Chevron*, is required to draw reasonable inferences from the statutory text to determine the intent of Congress.

PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT

FARMERS UNION MILK MARKETING COOPERATIVE; GERALD PICHE; PETER J. KLEIMAN; EDWARD O. KLEIMAN; ART J. COREY, JR.; RAYMOND J. MARSICEK; RALPH BROCK; ED E. HANCHEK; ROBERT S. HANCHEK; RAYMOND S. HUBER; BENJAMIN C. HUBER; GEORGE A. HUBER, on behalf of themselves and all members of Farmers Union Milk Marketing Cooperative pooled under Federal Order 40 are respondents in support of petition and were plaintiffs in the district court and appellants/cross-appellees in the court of appeals.

MANITOWOC MILK PRODUCERS ASSOCIATION is also a respondent in support of petition. It intervened as a plaintiff in the district court and was an appellant/cross-appellee in the court of appeals.

LANSING DAIRY, INC., LIBERTY DAIRY COMPANY, FRIGO CHEESE CORPORATION are the petitioners in this case. They were plaintiffs in the district court and appellants/cross-appellees in the court of appeals.

DON GLICKMAN, Secretary of Agriculture, United States Department of Agriculture, is, pursuant to Rule 35.3 of the Rules of this Court, the successor to MIKE ESPY who was the appellee and cross appellant in the Court of Appeals. EDWARD MADIGAN was his predecessor and the named party at time of judgment in the district court. His predecessor, CLAYTON YUETTER, was the named defendant in the district court.

PRODUCERS EQUALIZATION COMMITTEE, (P.E.C.) is a respondent in this case. At the time of initiation of the case the P.E.C. was comprised of Michigan Milk Producers Association, a Michigan agricultural corporation, Independent Corporation Milk Producers Association, a Michigan agriculture association, Southern Milk Sales, Inc., a Texas agriculture association, and National Farmers Organization, an Iowa non profit corporation. It intervened as a defendant in the district court and was an appellee and cross-appellant in the court of appeals.

Farmers Union Milk Marketing Cooperative and Manitowoc Milk Producers Associations are both agricultural cooperatives owned by their producer members. There are no public corporations of which they are either subsidiary or parent.

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In The
SUPREME COURT of the UNITED STATES
October Term, 1994

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*No.*94-1734

LANSING DAIRY, INC., *et al.*,
Petitioners
v.

DAN GLICKMAN,
SECRETARY OF AGRICULTURE, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE U.S. COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Brief of Respondents
in Support of
Petition for a Writ of Certiorari

OPINIONS BELOW

The court of appeals opinion (Pet. App. 1a-40a) is reported at *Lansing Dairy, Inc. v. Espy*, 39 F. 3d 1339 (6th Cir. 1994).

The opinion by the district court is not reported but appears at 1992 WL 71372 and is found at Pet. App. 41a-60a.

JURISDICTION

On January 23, 1995 the court of appeals denied an application for rehearing of that court's October 31, 1994 decision. Pet. App. 266a-267a. Petitioners filed a petition for certiorari on April 21, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

7 U.S.C. §608c(5), 7 U.S.C. §608c(18) and 7 C.F.R. Part 1040 are reproduced, in relevant part, at Pet. App. 268a-278a.

STATEMENT

1. Pursuant to the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. §§601 *et seq.* (Act), the Secretary of Agriculture formulates and administers federal milk marketing regulations in various regions throughout the United States to regulate the "minimum prices" of milk to be paid to producers. Each of these regions is referred to as a "marketing area" and the regulations concerning the marketing of milk in the area are commonly referred to as "orders". There are currently forty (40) such milk marketing orders being administered by the Secretary throughout the United States.[1] These are described at 7 C.F.R. Parts 1001 through 1139 and these marketing areas encompass virtually all major metropolitan areas in the continental United States—the notable exceptions being those in California.

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[1]The Secretary recently recommended the merger of five markets covering most of the six-state southeast region. 60 Fed. Reg. 25014 (May 10, 1995).

These marketing areas are regions defined by regulation (*eg.*, 7 C.F.R. §1040.2) in which milk is distributed for sale to the consumer. Since the marketing area deals with sales of bottled milk, location of the dairy farm is not relevant. For example, there are now no dairy farmers located in Wayne County, Michigan, but it constitutes the largest market for milk in the Southern Michigan marketing area. Similarly, that milk is produced in one state for marketing in, and regulation under an order in, another state is totally irrelevant. A producer comes under the benefits of an order when that producer chooses to market milk to a regulated plant.

The corner stone of this legislation is a two tier pricing system—handlers pay for the use of the milk and producers receive a uniform price regardless of use. Handlers pay minimum prices per hundred weight which are based upon the use for which the milk is being made. Fluid milk use is called Class I, and handlers pay the highest price for that milk. Soft milk products, such as yogurt, creams and the like are priced at a lower Class II price. Other products with a longer shelf life, such as butter, cheese and powder, are treated as Class III or the lowest value. The Class I price paid by handlers (not Class II and Class III) is also based, in part, on the location of the plant.

All of the money received is then "pooled", deductions for reserves and expenses of administration are made and the balance is "blended" so that the minimum prices that producers receive are uniform in that any differences do not result from differences in the actual use to which the milk of a producer is placed.

The minimum price paid to producers is also based, in part, on the location of the plant which receives the producers' milk. These are called "location adjustments". Although handlers pay adjustments only on Class I milk, the producers' minimum price on all of their milk, regardless of use, reflects the location to which it was delivered. The "uniform price" is not

known until the effect of location adjustments charged or credited to handlers and producers is calculated. 7 C.F.R. §1040.61.

Simply stated, this is the formula for computing the minimum price that a producer receives: Plants make payments to the producer settlement fund for milk based on the use to which the plant put the milk. Payments for Class I usage are also adjusted based upon the plant's location. Plants with a positive location or zone pay additional money, those with a lower zone pay less. The total receipts from the plants are then reduced by the total value of positive location adjustments due to producers and increased by the total value of negative location adjustments on producer deliveries. This net amount is divided by the total pounds for an "uniform price". Before payment to a producer, that producer's price is determined by adjusting the uniform price location based upon the location to which he delivered the milk. 7 C.F.R. §§1040.60-62.

Not only does the amount of the location adjustment directly impact the minimum price paid producers by location of his deliveries, but, as noted above, the "uniform price" before individual producer prices are set includes and reflects locations of the plants who pay and the locations to which producers have delivered. Because handlers pay location adjustments only on Class I milk while producers receive the adjustments on all of their milk, a minus location adjustment (lower price) will contribute to a higher over all blend price though the adjustment to the blend will be at a lower rate than the rate of the location adjustment. Conversely, a positive location adjustment (higher price) will lower the overall blend, again at a lower rate than the rate of adjustment.

The Secretary has defined location adjustments as geographic zones, or in terms of distance from fixed points. Within defined zones, all plants have the same price. Zones do not have to be in the marketing area.

Location adjustments, though based on the distance that the plant is from the primary market, reflect the transportation costs only in part. The Secretary has historically set rates of adjustment conversely to the supply and demand in the market, with use of higher rates of adjustment in areas where the supply-demand is tighter and the use of lower rates in areas where the supply-demand is lower. For example, the rate of 2.5 cents per hundred weight per ten miles in milk-deficit Georgia is about twice the rate used in Wisconsin. *Cf.* 7 C.F.R. §1007.52 with 7 C.F.R. §1030.52.

The Secretary has the authority to amend or modify those orders. 7 U.S.C. §608c(17). These orders are only modified after notice *and hearing* rule making unlike the more common method of notice and comment. The Secretary has promulgated rules of practice describing the process. 7 C.F.R. §§900.1 *et seq.*

At rule-making hearings, testimony is taken under oath and exhibits are presented in support of, or in opposition to, proposals that the Secretary has noticed. An agent of the Secretary participates in the hearing to the extent of cross examination of witnesses. After the hearing, parties are permitted to file briefs and the Secretary then issues a written recommended decision based upon the record created at the hearing. 7 U.S.C. §608c(4), 7 C.F.R. §900.12. A comment period follows, and the Secretary either accepts, rejects, or modifies the recommended decision. After the Secretary makes a final decision, the proposed amended order is placed before producers or cooperative associations in a referendum for their approval. 7 C.F.R. §§900.300 *et seq.*; 7 U.S.C. §§608c(8)-(9), (12), and (19).

The Act specifies *when* the Secretary can make amendments, 7 U.S.C. §608c(18), and *what* kind of regulations he can promulgate. 7 U.S.C. §608c(5). The Secretary does not have the authority to make amendments based solely on agency policy, current national or industry politics, or economic theory. Any change by the Secretary must be based on the record, he cannot

fix minimum payments to producers based on use, and, in any event, he can only modify the order after he has first determined that sufficient marketing changes have occurred justifying such changes. 7 U.S.C. §608c(4).

2. On May 24, 1988, the Secretary held a formal rule-making hearing to consider, among others, an amendment to the Southern Michigan Order proposed by P.E.C. to modify location adjustment mileage rates so as to reduce the prices paid to Producers[2] and enhanced the minimum prices paid to P.E.C.

On February 21, 1989, the Secretary issued a Recommended Decision, published at 54 Fed. Reg. 7,938 (February 24, 1989), which recommended adoption of the P.E.C. location adjustment proposals.

On June 20, 1989, the Secretary issued a Final Decision, published at 54 Fed. Reg. 26,768-26,780 (June 26, 1989), Pet. App. 71a - 126a, adopting the P.E.C. location adjustment proposals and rejecting the exceptions submitted by the Producers. On July 6, 1989, the Secretary issued a Final Rule amending the pricing regulations of Order 40, as requested by P.E.C., effective for milk marketed on and after September 1, 1989.

3. The Producers were particularly damaged by the proposal because the challenged amendments[3] to the Order amended 7 C.F.R. §1040.52(a) by changing "1 cent" to "2.25 cents". This new rate is greater than any other rate in surplus production

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[2]"Producers" refers to Farmers Union Milk Marketing Cooperative, Manitowoc Milk Producers Association and the individual dairy farmer members of Farmers Union named as plaintiffs below.

[3]Final Rule, 54 Fed. Reg. 29,327, 29,328 (July 12, 1989). Amended Order. Pet. App. 71a - 126a.

markets of the north central states. The amended rate reduced the minimum prices to Producers by almost thirteen cents per hundredweight at Frigo's Carney, Menominee County, Michigan plant, to twenty cents per hundredweight at Frigo's Lena, Oconto County, Wisconsin plant to twenty-three cents per hundredweight at Frigo's Wyocena, Columbia County, Wisconsin plant.

The adverse impact of these changes has been significant on the Producers.[4] This should surprise no one. The P.E.C. stated at the rule-making hearing that its primary intent by these proposals was to "redistribute" the money to producers by increasing the revenue of its members in the Southern Peninsula and reduce the revenue to the non P.E.C. members—*i.e.*, Producers.

Because this was a resulted-oriented decision, the Secretary had to abandon his traditional reliance upon 7 U.S.C. §608c(18) in setting location adjustments. Contrary to prior (and subsequent) decisions applying 7 U.S.C. §608c(18) standards, the Secretary (1) increased Southern Peninsula milk prices notwithstanding a finding of plentiful milk supplies, and (2) increased the Upper Peninsula/Wisconsin mileage rate to one characteristic of deficit markets.

The Secretary expressly relied upon the U.S.C. §608c(5)(A) as the only authority and standard to support the amended location adjustments.

The Secretary wrote:

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[4]Producers estimate that the amendments in the aggregate shifted about one million dollars per year from Producers and other dairy farmers in Wisconsin and the Upper Peninsula of Michigan to Southern Peninsula farmers--predominantly P.E.C. members.

> Section 8c(18) is the authority for the Secretary to change the Class I differential if supply and demand warrants a change in order to increase or decrease milk production. The ***authority for the Secretary to provide for pricing zones (location adjustments) in an order is found in section 8c(5)(A) of the Act.***

54 Fed. Reg. 26,774-26,775 (June 26, 1989) Pet. App. 99a-100a. [Emphasis added, parenthetical material in original].

The Secretary relied on but one factor to justify the mileage rate amendment to 7 C.F.R. §1040.52(a)(2). This was the increased costs of hauling milk. 54 Fed. Reg. 26,777 (June 26, 1989). Pet. App. 112a. However, in promulgating the amendments to the zone rate adjustments, the Secretary acknowledged that:

> These changes will produce a flatter[5] Class I and uniform price structure within the marketing area. . . * * *
>
> [T]he change from seven pricing zones to three pricing zones ***is not tied to the cost of moving milk***. . . .

54 Fed. Reg. 26,772 and 26,774 (June 26, 1989) Pet. App. 88a and 98a. [emphasis added and footnote added]

4. In September 1989, Farmers Union Milk Marketing Cooperative and individual members, filed suit in the Northern Division of the Western District of Michigan complaining, *inter alia*, that the price amendments exceeded the Secretary's statutory authority, and were made without supporting evidence and in

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[5] "Flatter" price means that the range from highest to lowest prices in the marketing area is very narrow. This contradicts the "sharp", not "flat" pricing, the Secretary adopted for milk not supplied by members of the P.E.C.

violation of minimum requirements of reasoned agency decision making. Plaintiff Producers first had to overcome agency arguments that they did not have standing to complain of lost income. *Farmers Union Milk Marketing Coop. v. Yuetter,* 930 F.2d 466 (6th Cir. 1991). By early 1992, the issue of standing was resolved in the Producers' favor, the Handlers' action was consolidated with that of Producers,[6] and the district court received cross-motions for summary judgment on the administrative record.

The district court, per Judge Benjamin F. Gibson, using common rules of statutory construction, and in accordance with *Chevron,* found that the Act clearly required a §608c(18) economic impact analysis before making any modifications to the pricing as the agency had maintained in the past. It held that to do otherwise would "theoretically allow the Secretary to circumvent the specific Congressional delegation by conducting all market regulation through price adjustments." Pet. App. 58a. Because the Secretary admitted that he did not use the analysis required under 7 U.S.C. §608c(18), that court held that the Secretary improperly promulgated the regulation.

5. On appeal, the court of appeals recognized that there was a change in agency statutory construction, and that the agency incredibly disavowed such change. Nonetheless, that court found that the agency's new-found construction was permissible under the Act and reversed the district court.

After the court of appeals issued its decision, the Secretary issued a recommended and final decision in the proposed merger of several Southern milk orders where he reverted to the decades-old analysis as required by 7 U.S.C. §608c(18), in making location adjustments. 60 Fed. Reg. 25014, 25037-25046 (May 10, 1995) (Reasoning, for example: "There is no reason to expect handlers

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[6]The Petitioners are sometimes referred to as "Handlers".

to pay any more than necessary to obtain an adequate supply of milk for fluid use. The prices at [Zone 10] are appropriate ***using this standard.***" and "The available supplies of milk in [Zone 12] do not justify continuation of the present price structure." [emphasis added])

6. On January 23, 1995, the court of appeals denied the Producers and Handlers' requests for rehearing. The Handlers petitioned this Court for a writ of certiorari on April 21, 1995. Producers received their copy of the Petition on April 24, 1995. Pursuant to Rule 12.4 of this Court, the Producers are submitting this Brief in Support of the Petition.

REASONS CERTIORARI SHOULD BE GRANTED

The court of appeals decision in the instant case represents a conflict within the circuits in administrative law in the wake of this Court's decision in *Chevron, U.S.A. v. Natural Resources Defense Council,* 467 U.S. 837 (1984) and this Court's recent decision in *Brown v. Gardner,* ___ U.S. ___, 115 S. Ct. 553 (1994). The court of appeals has, in its interpretation of the *Chevron* analysis, found ambiguities without resort to standard rules of statutory construction. As a result the Sixth Circuit has set precedent for the proposition of near judicial abdication in review of agency actions.

I

If anything, Petitioners' first question phrases the issue in terms too kind to the agency. In the instant case, the agency not merely changed its policy after the rule making hearing, but did so only momentarily for the purposes of obtaining a result that it could not have obtained under prior policies, and, once that objective was realized, the agency returned to a decades-old policy of requiring 7 U.S.C. §608c(18) economic impact analysis when adjusting minimum prices paid to producers, regardless of how

the adjustment was characterized. Not only did it make this quick change about, but both before the district court and the court of appeals it argued that it had never changed its position in the first place. *In re Lansing,* 50 Agric. Dec. 1453 (1991) Pet. App. 185a. The court of appeals found such disavowal "not credible". Pet. App. 30a. The district court rejected this claim as well.

The facts in this case thus frame the issue as to how much, if any, deference courts should give to such an agency double flip-flop without any explanation of why such change is necessary in light of this Court's holdings in *Motor Vehicle Mfrs. Assn. v. State Farm Mut. Auto Ins. Co.* 463 U.S. 29, 41-42 (1983) and *Chevron.*

The court of appeals has ignored the requirement of agency explanation, and has, instead, chosen to defer to the agency's view so long as it is permitted under any malleable stretch of interpretation of the Act. The court of appeals decision goes so far as to indicate that the agency's view need not be spelled out, only potentially understood. As a result, the decision of the court of appeals conflicts with the other circuits and this Court.

Justice Scalia, has argued that reasonable agency determinations, even if deviant from "longstanding and consistent" agency interpretations, should receive deference. *Chevron* has come to allow agencies to change their minds so long as the new rationale is consistent with one of the possible interpretations of the statute and one "it thinks most conducive to accomplish most of the statutory purpose." This flexibility permits the agency to change direction without Congressional

action. Antonia Scalia, Judicial Deference to Administration Interpretations of Law, 1989 Duke L.J. 511, 517 (1989).[7]

Arguing that the court of appeals is wrong in the instant case is not arguing against this postulate. The court of appeals departs from the Scalia standard of deference by excluding "statutory purpose" from the interpretive equation employed by the agency. The court of appeals decision cheapens the force of Justice Scalia's logic by making any ***result*** of agency action deferrable even if the rationale is unstated, unclear, or first developed in the course of post-rulemaking litigation.

The court of appeals decision provides more than that flexibility that is necessary to adapt to changing circumstances, policies and concepts for the public good, but, beyond the necessary, permits, even licenses, the facility to fashion any result the agency desires or feels politically expedient at the time so long as the courts can discern some statutory rationale absent the agency's own expression of one. Such alleviates the necessity of any agency explanation of the change as required by *Motor Vehicle Mfrs. Assn.*

The regulations in the instant case establish the economic relations between plants and dairy farmers. Relying on this regulatory basis, Producers and Handlers have contracted with each other and others in the buying and selling of milk. Their economic interrelationship draws its strength from these pricing regulations. For the Secretary momentarily to ignore his own long standing policy that undergirds these pricing regulations, and, thus, rearrange the economic landscape without any reasoned explanation of the rationale for such a departure is nothing less than giving the Secretary the kind of unfettered ability to regulate the dairy economy that the Congress

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[7]The court of appeals relied upon this argument in its decision in this case. See Pet. App. 31a, n.3.

specifically sought to avoid when it repealed the handler licensing provisions and adopted the present statutory scheme. *Zuber v. Allen,* 396 U.S. 168, 174, (1969). There is a misapprehension of *Chevron* when the Secretary can, under the guise of a *Chevron* analysis, read a statute so differently so as to enlarge the statute's reach beyond that intended by Congress in the first place. This is nothing less than granting an agency the license to legislate liberally its own limitations.[8]

In order for the Secretary to do what he did in the Southern Michigan area he had to ignore the supply-demand limitations of 7 U.S.C. §608c(18), because he raised Southern Peninsula prices even though the market had an adequate supply of milk there was no need to change the pricing structure. (Compare earlier Southern Michigan decisions, 42 Fed. Reg. 37562, 37565 (1977), 33 Fed. Reg. 6027, 6030-31 (1968), and 30 Fed. Reg. 7703 (1965), in which adequate milk supplies restrained requests for price increases). In large part because of that and a separate finding that there was no need to make changes to maintain a supply of milk, there was no policy basis supporting his decision. By ignoring 7 U.S.C. §608c(18) and the lessons of

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[8] Such authority also gives the agency the right to overrule the Court by the creation of nearby differentials. *Zuber v. Allen*, 396 U.S. 168, 90 S. Ct. 314, 24 L.Ed. 2d 345 (1969). The Secretary virtually found the nearby milk of P.E.C. more valuable than the more distant milk of the Producers and utilized two distinct schemes to set location prices--one scheme for the P.E.C. group and one for the Producers. Allowing the Secretary to create economic stress on the politically impotent Producers for the benefit of the politically potent cooperatives is to authorize the Secretary to participate in, and create, the very ruinous marketing conditions for which the power was given to the Secretary to eliminate. *Id.*

Adam Smith, the Secretary felt free to raise Southern Michigan prices in the face of a production glut, and to increase mileage rates without regard to need for transportation incentives. In this regard, the court of appeals decision also conflicts with the Third Circuit which has held that the Secretary can only change a marketing order only after he finds that there are disorderly marketing conditions making such a change necessary. *Lehigh Valley Farmers v. Block,* 829 F.2d 409 (3rd Cir. 1987) below 640 F. Supp. 1497 (E.D. Pa. 1986).

Chevron must be analyzed in terms of the nature of the agency action involved. To announce changes in policies or interpretations of the underlying statutes in a notice and comment rulemaking procedure is one thing. Notice and hearing rulemaking is something altogether different. In the latter fundamental fairness demands that participants are entitled to *prior* notice of any changes in agency interpretations in policies upon which a regulation will issue so that the participants can fully prepare for, and participate in, the evidentiary portion of the rulemaking proceedings.

When an agency, such as the Secretary in this case, abandons a decades-old policy and interpretation momentarily for just one case, and not only does not explain how the change in interpretation is necessary to further the purposes of the Act, but incredibly denies it has made the change at all, that rationale deserves no deference whatsoever.[9] In that regard, this Court in

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[9]The Court has touched on the issue. *Skidmore v. Swift & Co.,* 323 U.S. 134, 140, 65 S. Ct. 1561, 164, 89 L.Ed. 124 (1944) (Earlier pronouncements, reasoned and consistent are persuasive if not controlling.) *INS v. Cardoza-Fonseca,* 480 U.S. 421, 426 n. 30, 107 S.Ct. 1207, 1221, n. 30, 94 L.Ed. 2d 434 (1987) (Conflicting interpretations differing from earlier pronouncements get considerably less deference.) *Motor Vehicle*

response to the first question raised by the Petitioner should reestablish standards of judicial deference to agency action.

II

The second question raised by the Petitioner is whether in the first step of *Chevron*, the court is required to use the normal tools of statutory construction or shall the court find ambiguity exists even if such ambiguity only arises if canons of statutory construction, and the inferences that they yield, are ignored.

The nature of statutory interpretation lies at the core of the court of appeal's confusion. In *Chevron* the first order is to see if Congress speaks clearly.[10] The Court has spoken to the issue on several occasions.

Deference to agency rationale ends when clear statutory meaning begins. *Teamsters v. Daniel,* 439 U.S. 551, 566, n. 20

Mfrs. Assn., State Farm Mut. Auto Ins. Co. 463 U.S. 29, 41-42. (A settled interpretation that persists over time is presumptively to be preferred.) *Kungys v. U.S.*, 485 U.S. 759, 778, 108 S. Ct. 1537, 1550, 99 L. Ed. 2d 839 (1988). (Introducing new criteria and standards not provided by statute is impermissible.)

[10] The court of appeals hints that Congress is practically incapable of speaking clearly enough to stop the *Chevron* analysis at the first step when it questions:

> While we will not dwell on whether in recent years "unambiguously expressed intent of Congress" has become an oxymoron. . .

Pet. App. 23a. If this were the case, then the first step in *Chevron* is a meaningless exercise.

(1979) ("This deference is constrained by our obligation to honor the *clear* meaning of a statute as revealed by its language, purpose, and history." [emphasis added])

The question is whether the court must find a clear interpretation in the first step, or start with the agency's view and first find that the agency is clearly wrong. The Court has said both. "In sum, the text and reasonable inferences from it give a *clear* answer against the Government, and that, as we have said, is 'the end of the matter.'" *Brown v. Gardner,* S.Ct. at 556. *Chevron*, 467 U.S. at 842, 104 S.Ct. at 2781, 81 L.Ed. 2d 694 (1984) [emphasis added]. The middle ground is to use the plain language as a foil by which to observe the agency's rationale. *Public Employees Retirement System of Ohio v. Betts,* 492 U.S. 158, 171 (1989) "[N]o deference is due to agency interpretations at odds with the plain language of the statute itself."

All of this places the emphasis on whether determination of the existence of ambiguity in the first *Chevron* step, or in an analysis of an agency's own interpretation in the second step, requires a resort to statutory construction. "[D]eference is not abdication, and it requires us to accept only those agency interpretations that are reasonable in light of the principles of construction courts normally employ." *EEOC v. Arabian American Oil Co.,* 499 U.S. 244, 260 (1991) (SCALIA, J., concurring in part and concurring in judgment).

Focused differently, the question is whether the courts must first discern if there is a plain interpretation arrived at by proper statutory interpretation and only then compare that interpretation with the agency's own, as *Chevron* implies, or, alternatively, see if the agency's interpretation is a possible one without resort to such statutory analysis.

A search for clear meaning in the first step requires the Court to examine a statute without reference to the spin of ambiguity created by the agency. The court's duty is to start with

the statute, not agency construction. The applicability of 7 U.S.C. §608c(18) then requires examination of milk order price rules in practical context—a step which the court of appeals overlooked entirely.[11]

The first rule of statutory construction is to use the plain meaning of the words used. *Good Samaritan Hosp. v. Shalala,* 508 U.S. ___, ___, 113 S.Ct. 2151, 2157 (1992) The reading must be of the whole statute, not isolated passages. Utilizing these canons of construction there is no ambiguity in the relevant statutes in this case. Statutory interpretation is a "holistic endeavor". *United Savings Assn. of Texas v. Timbers of Inwood Forest Associates, Ltd.,* 484 U.S. 365, 371 (1988).

The Congress requires that the Secretary,

> . . . prior to prescribing **any term** in any marketing agreement or order, or amendment thereto, relating to milk or its products, is such term is **to fix minimum prices to be paid to**

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[11] A reasonable interpretation of words alone may overlook an absurd or irrational result in their application, which must be avoided if at all possible. *Chapman v. U.S.,* 500 U.S. 453, 476 (1992) (STEVENS, J., dissenting. "There is nothing in our jurisprudence that compels us to interpret an ambiguous statute to reach such an absurd result." In practical application, the Secretary's interpretation would irrationally attribute Congressional concern for only part of the formula by which the unadjusted "uniform price" is calculated. 7 C.F.R. §1040.61, Pet. App. 2741; and in a recent decision by the Secretary, it would imply legislative directives for prices and supplies in Birmingham, Alabama (Zone 7, base zone) but not Nashville (Zone 1) or New Orleans (Zone 12). 60 Fed. Reg. 25014, 25037-25046 (May 10, 1995).

> **producers** or associations of producers, or **prior to modifying the price fixed in any such term,** shall ascertain the parity prices of such commodities.

7 U.S.C. §608c(18) [emphasis added]. It then goes on to specify factors to be weighed in changing the prices and farm income, factors the Secretary admittedly did not consider in this case.

The statute is unambiguous in that "any term" that "fix[es] minimum prices ***to be paid to producers***" is subject to 7 U.S.C. §608c(18). An unadjusted price exists only in the abstract. The only price producers receive under any federal milk order is the price on their milk check and that includes the location adjustments. Every location adjustment is a term which fixes or modifies "minimum prices to be paid to producers". Every location adjustment affects "level of farm income" as used in 7 U.S.C. §608c(18). Uniform (blend) prices paid to producers cannot be determined in the aggregate, or to individual producers, without reference to the value of location adjustments. 7 C.F.R. §1040.61, §1040.75.

By regulation, the Secretary, himself, has clearly defined the "minimum prices paid to producers" as a price resulting from the operation of location adjustments on the uniform price.

> (a) Except [when paying the cooperative association] . . . each handler (except a cooperative association) ***shall pay each producer for milk . . . not less than the applicable uniform prices computed pursuant to 1040.61 adjusted by the location and butterfat differentials*** pursuant to 1040.75 and 1040.74, respectively . . . .

7 C.F.R. §1040.73 [emphasis added].[12] The court of appeals finding that "any such term" is ambiguous as to whether it means the uniform price or the uniform price as adjusted assumes that the Secretary will only speak of minimum price as one term. However, the statute contemplates that the minimum price shall be either "fixed" by terms or by operation of a "method for fixing". The Secretary has chosen the latter. Every part of the pricing formula is "any term" contemplated by, and subject to, 7 U.S.C. §608c(18) standards. A change in any part of the formula affects "farm income" to which 7 U.S.C. §608c(18) is directed. An interpretation which avoids application of the standard to any part of the formula would also consequently divorce its application to the bottom line of prices and income to which 7 U.S.C. §608c(18) is directed. This would be absurd result.

This illustrates a second major cannon of statutory construction. A phrase in isolation that is ambiguous is clarified by the statutory context. *United Savings Assoc. of Texas, supra,* U.S. at 371 (1988). One cannot read 7 U.S.C. §608c(5) alone. It must be read in terms of the whole Act. Similarly "any such term" must be read in the context that speaks of effects on minimum prices. 7 U.S.C. §608c(18) All parts of the statute must have meaning. *Jarecki v. G. D. Searle & Co.,* 367 U.S. 303, 307-308 (1961). As such one must reject those interpretations making portions meaningless by ignoring them. *National Labor Relations Board v. Health Care & Retirement Corporation of America,* ___ U.S.___, ___, 114 S.Ct. 1778, 1783 (1994). Courts must give effect to all of the statutory language. *Reiter v. Sonotone Corp.,* 442 U.S. 330, 339 (1979).

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[12] In modifying the zones, the Secretary never modified this term (*i.e.,* 7 C.F.R. §1040.73) that makes location adjustments and uniform prices two integral and interdependent parts of the same whole--minimum prices paid producers.

Another canon of construction commonly used is to look to the purpose of the Act. If an interpretation yields a result inconsistent with the purpose, it should be rejected. *Gustafson v. Alloyd Company, Incorporated*, ___U.S.___, ___, 115S.Ct. 1061, 1069 (1995). Since the very purpose of the Act is to promote sufficient income to producers, it is unreasonable to find valid an interpretation that, on the one hand, requires the Secretary to formulate a price that will "assure a level of farm income adequate to maintain productive capacity sufficient to meet anticipated future needs" (7 U.S.C. §608c(18)) while on the other hand permits the Secretary to "adjust" these very price levels without consideration of such standards, even if such adjustment would emasculate the fundamental price below the desired needs.[13] The district court recognized this when it looked at 7 U.S.C. §602 where the pricing policy of Congress was enunciated. Pet. App. 55a. The court of appeals did not make an analysis of the Secretary's interpretation to determine if the policy of the Act was furthered. This Court should instruct that the undertaking avoided by the court of appeals is essential to judicial compliance with *Chevron*.

In the first step of *Chevron*, the courts should interpret the statute through the use of the normal canons of statutory construction. If the statute is unambiguous at this state, then that is the end of the matter. On the other hand, if such interpretation reaches a conclusion that the statute is ambiguous, only then can the courts consider the agency's view and determine if the

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[13]This Court has held that authority under the Act is to be narrowly construed. *Zuber, supra.* As such, any interpretation of the statute under *Chevron* must determine if ambiguity exists within such a narrow interpretation. *United States v. Centennial Savings Bank FSB*, 499 U.S. ___, ___, 111 S. Ct. 1512, 1519 (1991) (Tax exemptions given narrow interpretations.) This analysis also belongs in the first step of *Chevron*.

agency's interpretation is consistent with one of those statutory constructions already found.

CONCLUSION

The petition for a writ of certiorari should be granted. The confusion among the courts of appeals as to when and how to apply statutory construction requires further explanation of *Chevron.* Alternatively, the Producers suggest that the Court grant the petition, vacate the court of appeals decision, and remand it for consideration of the Court's decision in *Brown v. Gardner, supra*, or the forthcoming decision in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon,* No. 94-859 (argued April 17, 1995).

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94-1734

No. 94-

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1994

LANSING DAIRY, INC., *et. al.*,

Petitioners,

v.

DAN GLICKMAN,
SECRETARY OF AGRICULTURE, and

PRODUCERS EQUALIZATION COMMITTEE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PRODUCERS EQUALIZATION COMMITTEE'S BRIEF OPPOSING PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. If the statute at issue is ambiguous, did the Sixth Circuit Court of Appeals properly uphold the agency's interpretation of the statute, where the interpretation was reasonable and not inconsistent with the expressed intent of Congress?

2. If the statute at issue is not ambiguous, did the Sixth Circuit Court of Appeals nevertheless reach the correct result in this case by upholding the agency's interpretation of that statute, where the interpretation conforms to the plain meaning of the statute?

COUNTER-STATEMENT OF PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT

The Producers Equalization Committee ("P.E.C.") does not contest this section of Petitioners' petition, but adds that as of the commencement of this case, the P.E.C. was an unincorporated association of four dairy farmer organizations (Independent Cooperative Milk Producers Association, Inc., Michigan Milk Producers Association, National Farmers Organization, Inc., and Southern Milk Sales, Inc.). Southern Milk Sales, Inc., as of October 31, 1989, is no longer marketing milk or representing dairy farmers in Michigan. As of February 1, 1995, Mid-America Dairymen, Inc. is also a member of the P.E.C.

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COUNTER-STATEMENT OF THE CASE

These consolidated actions arose under the Agricultural Agreement Marketing Act of 1937 ("Act"), 7 U.S.C. §§ 601 et. seq., which authorizes the Secretary of Agriculture ("Secretary") to issue rules controlling the marketing of milk.[1] Intervenor Producers Equalization Committee ("P.E.C.") is an unincorporated association of dairy farmer ("producer") organizations that proposed amendments to Federal Order 40, 7 C.F.R. §§ 1040 et. seq., which governs the marketing of milk in the southern Michigan marketing area. Based on evidence that was introduced at a public hearing, the Secretary adopted the P.E.C.'s proposals. 54 Fed. Reg. 26768 et. seq. (1989) (App., 70a-126a).[2]

Petitioners are regulated milk processors ("handlers"), who operate "pool plants." See generally, 7 C.F.R. §§ 1040.7, 1040.9. This litigation concerns Petitioners' challenge to two of the four amendments approved by the Secretary. These amendments concerned: (1) the plant location adjustments for handlers, 7 C.F.R. § 1040.52 ("zone location adjustments"); and (2) the mileage adjustments for plants located outside of the southern Michigan marketing area, 7 C.F.R. § 1040.52(a)(2) ("mile-

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[1] For background information on the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. §§ 601 et. seq., see United States v. Rock Royal Co-op., 307 U.S. 533; 83 L. Ed. 1446; 59 S. Ct. 993 (1938); Defiance Milk Products Co. v. Lyng, 857 F. 2d 1065 (6th Cir., 1988); Lewes Dairy, Inc. v. Freeman, 401 F. 2d 308 (3d Cir., 1968), cert. den. 394 U.S. 929; 22 L. Ed. 2d 455; 89 S. Ct. 1187 (1969).

[2] Citations to the Appendix refer to the Appendix attached to Petitioners' petition for a writ of certiorari.

age rate" or "mileage location adjustment"). These adjustments for location are specifically authorized terms and conditions of milk marketing orders under 7 U.S.C. § 608c(5)(A) and (B). The Secretary relied on 7 U.S.C. § 608c(5) in amending the location adjustments to the minimum price that handlers must pay to producers for milk (App., 99a-100a). Petitioners argue, however, that the Secretary was required to evaluate the P.E.C.'s proposed amendments under factors set forth in 7 U.S.C. § 608c(18).[3]

The zone location and mileage location adjustments are adjustments to the base minimum price of milk which are used to economically encourage the movement of producer milk from rural production areas to plants in population centers and to align minimum prices among neighboring markets. See Walmsley v. Block, 719 F. 2d 1414, 1418-19 (8th Cir., 1983); Sunny Hill Farms Dairy Co., Inc. v. Hardin, 446 F. 2d 1124, 1128 (8th Cir., 1971), cert. den. 405 U.S. 917; 30 L. Ed. 2d 786; 92 S. Ct. 940 (1972). In Order 40, this encouragement is provided by a negative adjustment that "lowers" minimum prices for producer milk that is delivered to plants in rural locations, and a positive adjustment that "increases" minimum prices for milk that is delivered from rural production areas to plants in urban areas. Location and mileage adjustments reflect the fact that a handler who receives milk near consuming centers has a more valuable commodity than a handler who receives milk in a rural area and then must undertake the burden of transporting the milk to

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[3] Portions of 7 U.S.C. § 608c and 7 C.F.R. § 1040 are reproduced in Petitioners' Appendix, at 268a-278a.

consumer markets. Schepps Dairy v. Bergland, 628 F. 2d 11, 15-16 (D.C. Cir., 1979).

Petitioners challenged the validity of the amendments in a proceeding before the Secretary pursuant to 7 U.S.C. § 608c(15)(A). An Administrative Law Judge ("A.L.J.") concluded that the amendments were illegal, reasoning, in part, that the Secretary should have considered 7 U.S.C. § 608c(18)'s, factors in enacting the amendments (Initial Decision and Order; App., 208a-265a).[4] On appeal, however, the Secretary's Judicial Officer upheld the amendments (App., 61a-207a). The Judicial Officer explicitly rejected the A.L.J.'s reasoning, explaining that (1) the A.L.J. misinterpreted the separate and distinct applications of §§ 608c(5) and (18) in different situations; (2) for "over 50 years, it has been the contemporaneous and settled construction of the Act that changes in Class [minimum] prices are subject to § 8c(18) analysis, but that changes in location adjustments are not subject to a § 8c(18) analysis;" and, (3) the A.L.J. misread and misapplied the Judicial Officer's decision in In re Borden, Inc., 46 Agric. Dec. 1315 (1987), aff'd. No. H-88-1863 (S.D. Tex., 1990) in erroneously striking down the amendments (App., 185a-186a).

Petitioners then filed an action for review, declaratory relief, and money damages in the District Court pursuant to 7 U.S.C. § 608c(15)(B). On March 30, 1992, the District Court

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[4] Throughout their petition, Petitioners refer to various other arguments that they have made, and which have been rejected at various points in the appellate process. The P.E.C. does not address these arguments, since they are irrelevant to the questions presented in Petitioners' petition for a writ of certiorari.

granted Petitioners' motion for summary judgment (App., 41a-60a). The Court recognized that 7 U.S.C. § 608c(18)'s "minimum price" term was not defined by the statute, nor by the Secretary in any regulation, and that no case has defined or specifically discussed the precise meaning of this phrase. Nevertheless, the District Court found that the statute was not ambiguous; accordingly, the Court did not defer to the Secretary's interpretation under Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837; 81 L. Ed. 2d 694; 104 S. Ct. 2778 (1984). The Court essentially reasoned that the term "minimum price" encompasses adjusted prices that must necessarily affect the minimum price, so any proceeding amending permitted adjustments to prices must conform to the requirements of a proceeding to set the original minimum price (App., 53a-54a).

The Sixth Circuit Court of Appeals unanimously reversed the District Court, and upheld the amendments (App., 1a-40a). Applying the first part of the Chevron analysis, the Court of Appeals rejected the District Court's finding that the statute was not ambiguous (App., 20a-23a). The Court then addressed the parties' arguments relating to the second part of the Chevron analysis, and concluded that because "the language of the Act and the legislative history are not unambiguous and the Secretary's interpretation is neither unreasonable nor in conflict with Congress' intent, we are bound by Chevron to uphold the Secretary's interpretation" (App., 32a). The Court later denied Petitioners' petition for rehearing and rehearing *en banc*.

SUMMARY OF ARGUMENT

Petitioners' petition for a writ of certiorari lacks merit and should be denied. Petitioners essentially present Chevron arguments in reverse order — first arguing that the statute is ambiguous and should bear the interpretation that they desire, without deference to the Secretary's interpretation; and then arguing that the statute is not ambiguous, but still should bear the interpretation that they desire. In response, the P.E.C. first argues that if the statute is ambiguous, the Sixth Circuit Court of Appeals correctly found itself bound to uphold the Secretary's reasonable interpretation of the statute under this Court's clear precedent. Petitioners' arguments do not even challenge the fundamental and controlling reasonableness analysis, and therefore cannot alter the outcome of this case. There is no conflict among the circuit courts of appeals on this matter. Moreover, the Secretary's decision is entitled to deference, even if he changed his position (which the Secretary has consistently denied).

Second, the P.E.C. maintains (as it argued below) that the Petitioners' and the District Court's interpretation of the statute was contrary to the statute's plain meaning, which should be given effect. The statute's plain meaning conforms to the Secretary's interpretation. Thus, the Court of Appeals correctly reversed the District Court, and upheld the Secretary's decision, but for the wrong reason. In any event, the correct result has been achieved, and there is no aspect of this case that warrants further judicial proceedings.

ARGUMENT

I. THE COURT OF APPEALS PROPERLY DEFERRED TO THE SECRETARY'S INTERPRETATION OF THE STATUTE.

Petitioners' first argument (Petition, pp. 10-14) misconstrues the Court of Appeals' decision, and the controlling case law. The Court of Appeals upheld the Secretary's interpretation of the statute because that "interpretation is neither unreasonable nor in conflict with Congress' intent" (App., 32a). For these reasons alone — regardless of any deference that might have been appropriate — the Court of Appeals was bound by this Court's precedent to uphold the Secretary's decision. Since there is no sound basis to believe that the courts of other circuits would have misapplied the law, there is no merit in Petitioners' attempt to have their petition granted through an argument that the Court of Appeals' decision conflicts with the decisions of courts of appeals of other circuits (Petition, pp. 10, 14).

The Court of Appeals (App., 32a) correctly found itself bound by Chevron to uphold the Secretary's "reasonable" interpretation of a statute concerning a "gap" left open by Congress. 467 U.S. at 843-44. For an agency's interpretation of a statute to be upheld as permissible, that interpretation only has to be "rational and consistent with the statute." N.L.R.B. v. Food and Commercial Workers, 484 U.S. 112, 123; 98 L. Ed. 2d 429; 108 S. Ct. 413 (1987). The Secretary's interpretation need not be the only permissible interpretation, nor the interpretation that the Court would have adopted if it had initially considered the matter. Id. at n. 11; Federal Election Comm'n. v. Democratic

Senatorial Campaign Committee, 454 U.S. 27, 39; 70 L. Ed. 2d 23; 102 S. Ct. 38 (1981).

These well-established rules of statutory construction are tellingly unchallenged in Petitioners' petition. At most, Petitioners' arguments indicate that the statutory language at issue may bear the interpretation they desire — not that it cannot bear the interpretation adopted by the Secretary. See Sullivan v. Everhart, 494 U.S. 83, 91-92; 108 L. Ed. 2d 72; 110 S. Ct. 960 (1990). Under these circumstances, where the Secretary's interpretation is at least as plausible as Petitioners' interpretation, "there is little, if any, reason not to defer to [the Secretary's] construction." Good Samaritan Hospital v. Shalala, 508 U.S. ____; 124 L. Ed. 2d 368, 383; 113 S. Ct. 2151 (1993). See also Thomas Jefferson Univ. v. Shalala, 512 U.S. ____; 129 L. Ed. 2d 405; 114 S. Ct. 2381 (1994).

Petitioners do not, and cannot, content that the Secretary's interpretation of the statute is not entitled to deference, since this Court has repeatedly rejected the argument that an agency's interpretation "is not entitled to deference because it represents a sharp break with prior interpretations" of the statute in question. Rust v. Sullivan, 500 U.S. 173; 114 L. Ed. 2d 233, 251; 111 S. Ct. 1759 (1991) (quoting Chevron, 467 U.S. at 862). Instead, Petitioners contend that an agency's revised interpretation of a statute is not entitled to Chevron deference unless the agency supplies a reasoned analysis for adopting the new interpretation (Petition, pp. 10-11). Petitioners' contention lacks merit. This Court unanimously rejected a similar argument in Nationsbank of North

Carolina, N.A. v. Variable Annuity Life Ins. Co., 63 U.S.L.W. 4076, 4079 (Case Nos. 93-1612 and 93-1613, January 17, 1995) (deferring to Comptroller of the Currency's reasonable interpretation of the National Bank Act, and explaining, "any change in the Comptroller's position might reduce, but would not eliminate, the deference we owe his reasoned determinations").

Further, Petitioners' claim that the Secretary should have acknowledged his change of interpretation is unfounded. The Secretary has consistently maintained that he has not changed his interpretation of the statute. The Judicial Officer recognized that the construction of the statute had been settled for "over 50 years" (App, 185a). The Court of Appeals simply did not believe the Secretary, due to the absence of clear authority on this long-settled issue, and the Secretary's "lip service to 608c(18) when making § 608c(5) location adjustments . . . ." (App., 30a).

Petitioners erroneously contend that this case would have been decided differently by the courts of appeals for the D.C., Third, Ninth, and Tenth circuits. Those courts of appeals have followed this Court's controlling precedent in upholding agencies' reasonable interpretations of statutes. Village of Bergen v. F.E.R.C., 33 F. 3d 1385, 1388-89 (D.C. Cir., 1994); Katsis v. I.N.S., 997 F. 2d 1067, 1069, 1074 (3d Cir., 1993), cert. den. ____ U.S. ____; 127 L. Ed. 2d 93; 114 S. Ct. 902 (1994); Louisiana-Pacific Corp. v. Asarco, Inc., 24 F. 3d 1565, 1573-74 (9th Cir., 1994); Exxon Corp. v. Lujan, 970 F. 2d 757, 762-63 (10th Cir., 1992). See also DeOsorio v. I.N.S., 10 F. 3d 1034, 1042 (4th Cir., 1993) ("because we find the Board's

interpretation reasonable and consistent with congressional intent, any inconsistency between this decision and previous Board decisions is immaterial"); Hicks v. Cantrell, 803 F. 2d 789, 793-94 (4th Cir., 1986) ("although the Secretary may have varied his interpretation . . . we must accord his interpretation deference so long as that interpretation is reasonable").

The cases that Petitioners cite for the purported conflict among the circuit courts of appeals do not support Petitioners' position (Petition, pp. 10-11). At most, these cases merely indicate that the consistency of agency interpretation is one factor that is relevant to determine the reasonableness of that interpretation. Thus, an acknowledgement and explanation of any inconsistency is not required, and does not control the outcome of the reasonableness analysis. All of the cases cited by Petitioners upheld the challenged agency interpretations as reasonable, with the exception of one case where the court rejected an unreasonable practice that was contrary to the practice that the agency had consistently advocated before the courts. Mobil Oil Corp. v. E.P.A., 871 F. 2d 149, 152-54 (D.C. Cir., 1989); Sacred Heart Medical Center v. Sullivan, 958 F. 2d 537, 550 (3d Cir., 1992); Mazza v. Secretary of Dept. of Health and Human Services, 903 F. 2d 953, 958, 960 (3d Cir., 1990); Flagstaff Medical Center, Inc. v. Sullivan, 962 F. 2d 879, 887 (9th Cir., 1992); Seldovia Native Assoc., Inc. v. Lujan, 904 F. 2d 1335, 1342-46 (9th Cir., 1990); Exxon Corp., supra., 970 F. 2d at 762-63.

There is also no merit in Petitioners' argument that deference is inappropriate since it is "possible" that the

Secretary did not fully reflect upon the policy that he was effectuating through his interpretation of the statute (Petition, pp. 12-13). Petitioners' attenuated argument has no direct support in the law, which Petitioners misconstrue in an effort to provide a basis for their unfounded position. Pauley v. Bethenergy Mines, Inc., 501 U.S. 680; 115 L. Ed. 2d 604, 624, 630; 111 S. Ct. 2524 (1991) (deference to agency was appropriate due to Congressional delegation of policy-making authority to agencies; Court deferred to agency's interpretation of regulations because that interpretation was reasonable); Wagner Seed Co., Inc. v. Bush, 946 F. 2d 918, 925 (D.C. Cir., 1991), cert. den. 503 U.S. 970; 118 L. Ed. 2d 304; 112 S. Ct. 1584 (1992) ("we are constrained to defer to the [agency's] reasonable interpretation of the statute"). The reasonable policy effectuated by the Secretary's interpretation of the statute is outlined below. Petitioners' policy arguments are properly addressed to legislators or administrators, not to judges. Chevron, supra., 467 U.S. at 864. Finally, Petitioners' argument about the Secretary's "possible" thought process has no support in the record, and cannot form a sound basis for further proceedings.

II. THE SECRETARY PROPERLY INTERPRETED THE STATUTE.

The Court of Appeals upheld the Secretary's interpretation of the statute as "neither unreasonable nor in conflict with Congress' intent" (App., 32a). The Court of Appeals reached the correct result and, if the statute was

ambiguous, correctly applied the second part of the Chevron analysis, as discussed above.

Petitioners' second argument attacks the Secretary's decision based on "reasonable inferences" that Petitioners assert with respect to the statute. This attenuated argument misses the mark, since it focuses on a narrow, insignificant portion of a larger analysis, which is the first half of the Chevron test: "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." 467 U.S. at 842-43.

Although the P.E.C. supports the Court of Appeals' decision, the P.E.C. further maintains (as it argued below) that the Secretary's decision was proper because the statute plainly grants the Secretary the authority to make location adjustments under § 608c(5), independent of the restriction in § 608c(18) requiring the Secretary to consider "the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk or its products in the marketing area" when the Secretary acts to "fix minimum prices." The Court of Appeals therefore reached the correct result, but for the wrong reason. In any event, this distinction makes no difference in the outcome of this case, since the Secretary interpreted the statute in accordance with its plain meaning.

In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole. K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 291; 100 L. Ed. 2d 313; 108

S. Ct. 1811 (1988). Section 608c was the first of the two statutory provisions enacted into law, becoming law in 1935. See Pub. L. No. 320, 49 Stat. 750, 754 - 755. Section 608c(5)(A) grants the Secretary the authority to classify milk in accordance with the form or purpose of its use, and grants the Secretary the authority to "fix[], or provide a method for fixing, minimum prices for each such use classification which all handlers shall pay . . . ." 7 U.S.C. § 608c(5)(A). Congress directed that "[s]uch prices shall be uniform as to all handlers." Section 608c(5) then grants the Secretary the authority to vary the uniformity of the prices by making them "subject . . . to adjustments for [*inter alia*]. . . the locations at which delivery . . . is made to such handlers." Ibid.

As enacted, § 608c(5)(A) authorized the Secretary to classify and to fix minimum prices, directed that the prices should be uniform to such handlers, but authorized the Secretary to adjust the price paid by a given handler — i.e., made not uniform — based upon the location at which that handler took delivery. Plainly, therefore, Congress understood that § 608c(5)(A) empowered the Secretary to do three separate things — classify according to use, fix minimum prices, and vary the uniform application of the minimum price on the basis of the location at which a handler took delivery.

It is plain from the language of § 608c(5)(A) that the location adjustment authority is not related to the fixing of the minimum price. Rather, it is related to the requirement that "[s]uch prices shall be uniform to all handlers," expressly subjecting the 'uniformity" requirement to the authority of the Secretary to 'adjust" the price for the location at which milk is delivered.

A similar analysis is apropos to subsection (B), which requires "payment to all producers. . . delivering milk to the same handlers of uniform prices for all milk delivered, irrespective of the uses made of such milk." In other words, the Secretary is to provide that producers receive uniform prices under the stated conditions — however, once again the Secretary is expressly authorized to vary the requisite uniformity by "adjustments for . . . the locations at which delivery. . . is made." 7 U.S.C. § 608c(5)(B).

In subsection (B) there is no reference to the fixing of a minimum price, as appears in subsection (A). Rather, subsection (B) is devoted solely to the requirement of "payment to all producers . . . of uniform prices," accompanied by the proviso, also present in subsection (A), that the uniform prices may be varied by the location at which delivery is made. Thus, subsection (B) confirms the conclusion that the location adjustment is not a function of fixing a minimum price. Rather, it is a separate grant of authority to the Secretary to vary the uniformity of prices paid by handlers, 7 U.S.C. § 608c(5)(A), and to vary the uniformity of the payments to be made to producers, 7 U.S.C. § 608c(5)(B), on the basis of the locations at which the delivery is made.

With the three authorities created in § 608c(5) in place, in 1937, Congress reenacted § 608c(5), which, to the extent relevant to this litigation, is unchanged from the 1935 version. See Pub. L. No. 137, 50 Stat. 246. At the same time, Congress first enacted what is now § 608c(18). Ibid. and 247. Section 608c(18) directs that the Secretary, prior to enacting a term which

will "fix minimum prices to be paid to producers . . ., or prior to modifying the price fixed," shall conduct an extensive examination of "price of feeds, the available supplies of feeds, and other economicconditions which affect market supply and demand for milk or its products in the marketing area . . . ." Ibid.

Thus, § 608c(18) directly affects the second of the three authorities granted to the Secretary by § 608c(5) — the authority to fix minimum prices. However, § 608c(18) nowhere addresses, or refers to, the other two authorities granted the Secretary by § 608c(5) — the authority to classify, and the authority to vary (i.e., "adjust") the uniformity of prices.

The District Court failed to recognize that 7 U.S.C. 608c(5) and 7 U.S.C. § 608c(18) concern entirely different matters. It makes no sense to conduct a 7 U.S.C. § 608c(18) analysis when amending 7 U.S.C. § 608c(5) location adjustments.

7 U.S.C. § 608c(18) concerns parity prices:

> "The Secretary of Agriculture, prior to prescribing any term in any marketing agreement or order, or amendment thereto, relating to milk or its products, if such term is to fix minimum prices to be paid to producers or associations of producers, or prior to modifying the price fixed in any such term, shall ascertain the parity prices of such commodities. The prices which it is declared to be the policy of Congress to establish in section 602 of this title shall, for the purposes of such agreement, order, or amendment, be adjusted to reflect the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk or its products in the marketing area to which then contemplated

marketing agreement, order, or amendment relates. Whenever the Secretary finds, upon the basis of the evidence adduced at the hearing required by section 608b of this title or this section, as the case may be, that the parity prices of such commodities are not reasonable in view of the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk and its products in the marketing area to which the contemplated agreement, order, or amendment relates, he shall fix such prices as he finds will reflect such factors, insure a sufficient quantity of pure and wholesome milk to meet current needs and further to assure a level of farm income adequate to maintain productive capacity sufficient to meet anticipated future needs, and be in the public interest. Thereafter, as the Secretary finds necessary on account of changed circumstances, he shall, after due notice and opportunity for hearing, make adjustments in such prices." (Emphasis added.)

7 U.S.C. § 608c(18) relates to Congress' declared policy that the Secretary would establish and maintain orderly marketing conditions for agricultural commodities as will establish "parity prices" to farmers. 7 U.S.C. § 602. Essentially, the "parity price" concept is to ensure that farmers receive a level of income from agriculture that will allow them to maintain a certain standard of living. 7 U.S.C. § 1301(2). See also Parker v. Brown, 317 U.S. 341, 355 n. 3; 63 S. Ct. 307; 87 L. Ed. 315 (1942) (describing parity price concept that was set forth in prior version of 7 U.S.C. § 602(1); the present version of that statute

adopts the "parity prices" definition set forth in 7 U.S.C. § 1301, but the parity concept remains intact).

Pursuant to 7 U.S.C. § 608c(18), the Secretary takes the parity price of milk, which is a national figure, and adjusts it based on the "price of feeds, the available supplies of feeds and other economic conditions" to arrive at a minimum price for milk in each area that is governed by a federal milk marketing order. See United States v. Mills, 315 F. 2d 828, 832-33 (4th Cir., 1963), cert. den. 375 U.S. 819; 84 S. Ct. 57; 11 L. Ed. 2d 54 (1963). Thus, under 7 U.S.C. § 608c(18), the Secretary sets the minimum price in each marketing area, which is a reasonable price that assures dairy farmers a certain standard of living, in consideration of their costs of producing milk. 7 U.S.C. § 608c(18) does nothing more.

The Secretary then provides for adjustments to the minimum price in each marketing area, under 7 U.S.C. § 608c(5), which states, in relevant part:

> "In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section) no others:
>
> "(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers. Such prices shall be uniform as to all handlers, subject only to

> adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers." (Emphasis added.)

7 U.S.C. § 608c(5) authorizes the Secretary to adjust the minimum (7 U.S.C. § 608c(18)) price based on factors that are completely separate from the types of factors that the Secretary used to set the minimum price. There is no merit to Petitioners' argument that the Court of Appeals expanded the Secretary's discretion, and that there is now a problem because the Secretary should consider § 608c(18) factors when making § 608c(5) adjustments to minimumprices (Petition, p. 9). This is perhaps best illustrated by focusing on location adjustments, which the Secretary uses to move milk from rural areas, where it is produced, to urban areas, where it is consumed.

It is beyond serious dispute that this necessary movement of milk is dependent on 7 U.S.C. § 608c(5) location adjustments. What is important to recognize, however, is that the locations at which milk is delivered, and the reasons for delivering it there, are unrelated to the "price of feeds, the availability of feeds" or other "parity" issues included in the 7 U.S.C. § 608c(18) minimum price fixing criteria. Milk is moved in the Southern Michigan marketing area based on production levels and consumption needs in various locations, regardless of how much it might cost neighboring producers to produce milk in those locations.

For example, the Secretary could establish a 0¢ zone and a -5¢ zone to move milk from the -5¢ zone, where it is produced, to the 0¢ zone, where it is needed for consumption, even though the price and availability of feeds is the same in each zone. If the Secretary were required to base a location adjustment on the price and availability of feeds under 7 U.S.C. § 608c(18), he would be unable to make a necessary adjustment, even though it is expressly authorized under 7 U.S.C. § 608c(5). The District Court decision forced the Secretary into this unworkable position, however, by holding that he must base 7 U.S.C. § 608c(5) location adjustments on 7 U.S.C. § 608c(18) criteria. The District Court's decision ignored the plain language of the Act, and the realities of the federal milk pricing scheme.

The Court of Appeals properly reversed the District Court's decision, but should have based its decision on the first part of the Chevron analysis, and never reached the second part. This distinction makes no difference, however, since the plain meaning of the statute conforms to the Secretary's interpretation. Moreover, the plain-meaning arguments set forth above give further support to the Secretary's interpretation, in the event that the statute is considered to be ambiguous. In any event, the correct result has been achieved in this case, and there is no sound basis for further judicial proceedings.

CONCLUSION

The Producers Equalization Committee respectfully requests that this Court deny Petitioners' petition for a writ of certiorari.

Respectfully submitted,

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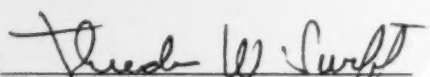
Dated: May 17, 1995

By: 

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No. 94-1734

In the Supreme Court of the United States

OCTOBER TERM, 1995

LANSING DAIRY INC., ET AL., PETITIONERS

v.

DAN GLICKMAN, SECRETARY OF AGRICULTURE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

The Agricultural Marketing Agreement Act of 1937 (Act) authorizes the Secretary of Agriculture to issue milk marketing orders containing terms that, *inter alia*, fix minimum prices for milk and provide for adjustments to those prices, known as "location adjustments," based on "the locations at which delivery of such milk * * * is made" to milk handlers. 7 U.S.C. 608c(5)(A)(3). A separate provision of the Act, 7 U.S.C. 608c(18), requires the Secretary to analyze the market conditions for milk before he prescribes or modifies any term in a milk marketing order that fixes minimum prices. The Secretary interprets the Act not to require him to conduct the economic analysis described in Section 608c(18) when he prescribes or modifies the terms in a milk marketing order providing for location adjustments. The question presented is:

Whether the court of appeals correctly upheld the Secretary's interpretation of the Act under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-40a) is reported at 39 F.3d 1339. The opinion of the district court (Pet. App. 41a-60a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 31, 1994. A petition for rehearing was denied on January 23, 1995. Pet. App. 266a-267a. The petition for a writ of certiorari was filed on April 21, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Agricultural Marketing Agreement Act of 1937 (Act), 7 U.S.C. 601 *et seq.*, authorizes the Secretary of Agriculture to issue and amend marketing orders for various agricultural products, including milk. Under the Act, the Secretary has issued 44 milk marketing orders that "encompass virtually all major metropolitan areas in the United States." Pet. App. 6a.

The Act requires the Secretary, before issuing or amending any marketing order, to hold formal, on-the-record rulemaking proceedings. See 7 U.S.C. 608c(3); 5 U.S.C. 553(c), 556-557; Pet. App. 8a. "In addition, before a milk marketing order * * * may become effective, it must be approved by the handlers of not less than 50% of the volume of milk covered by the proposed order or amendment and also must be approved by at least two-thirds of the affected dairy producers in the region. 7 U.S.C. § 608c(8)." Pet. App. 9a.[1]

The Act provides, 7 U.S.C. 608c(5) (1988 & Supp. V 1993), that milk marketing orders shall contain terms

> (A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay * * *. Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the

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[1] "Handlers" are entities, such as dairies, that buy milk from "producers" (*i.e.*, dairy farmers). See 7 U.S.C. 608c(1) (1988 & Supp. V 1993); 7 C.F.R. 1040.9, 1040.12.

> handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers. * * *

The Act thus contemplates that a milk marketing order will contain terms classifying milk according to its use;[2] fixing the minimum prices that handlers shall pay for each classification;[3] and providing for adjustments to the minimum prices based on three

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[2] The court of appeals explained the classification system as follows (Pet. App. 6a (citations omitted)):

> Some milk is distributed in fluid form. This milk, called Class I, commands the highest price. Class II milk is milk that is made into "soft products" such as yogurt and cottage cheese. It is priced lower than Class I milk. Other [milk] products with a longer shelf life (such as butter, cheese, and powdered milk) are considered to be Class III; the milk used to produce these products commands the lowest price.

See also Pet. App. 64a (decision of Judicial Officer).

[3] Whereas handlers pay a different minimum price for each classification of milk, producers receive a price for their milk that "is uniform in the sense that it does not vary based on the use to which the milk is put." Pet. App. 7a; see also 7 U.S.C. 608c(5)(B)(c) (1988 & Supp. V 1993) (milk marketing order shall contain terms providing for payment of uniform prices to producers subject to adjustments for, *inter alia*, "the locations at which delivery of such milk is made"). The price that producers receive, known as the "blend price," very roughly reflects the average price for all classifications of milk. See Pet. App. 6a. The device that allows handlers to pay prices for milk that differ according to its end use, while allowing producers to receive uniform prices, is a producer settlement fund. See *id.* at 6a-7a.

specific factors, including the location at which the milk is delivered to the handlers.[4]

A separate provision of the Act, 7 U.S.C. 608c(18), requires the Secretary to consider the economic conditions in the geographic area covered by a marketing order before prescribing any term in a marketing order "if such term is to fix minimum prices," and before "modifying the price fixed in any such term."[5]

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[4] The court of appeals described location adjustments as providing "economic incentives to encourage the movement of producer milk from rural production areas to plants in population centers, and to align prices among neighboring markets." Pet. App. 7a. Location adjustments are made only to the price that handlers pay for Class I milk. *Id.* at 6a; 7 C.F.R. 1040.52(a).

[5] 7 U.S.C. 608c(18) provides in full:

> The Secretary of Agriculture, prior to prescribing any term in any marketing agreement or order, or amendment thereto, relating to milk or its products, if such term is to fix minimum prices to be paid to producers or associations of producers, or prior to modifying the price fixed in any such term, shall ascertain the parity prices of such commodities. The prices which it is declared to be the policy of Congress to establish in section 602 of this title shall, for the purposes of such agreement, order, or amendment, be adjusted to reflect the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk or its products in the marketing area to which the contemplated marketing agreement, order, or amendment relates. Whenever the Secretary finds, upon the basis of the evidence adduced at the hearing required by section 608b of this title or this section, as the case may be, that the parity prices of such commodities are not reasonable in view of the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply

b. The milk marketing order at issue here is Order 40, which covers southern Michigan. 7 C.F.R. Pt. 1040; see Pet. App. 3a. On May 4, 1988, the Secretary (through the Agricultural Marketing Service (AMS)) published a notice proposing amendments to, *inter alia*, "the location adjustment provisions" of Order 40. 53 Fed. Reg. 15,851 (1988). As required by the Act, the Secretary held public hearings on the proposed amendments, accepted briefs from interested parties, issued a recommended decision, and ruled on exceptions to the recommended decision. The final decision was issued in June 1989, following approval in a producer referendum. See 54 Fed. Reg. 26,769, 26,779 (1989); *id.* at 29,327. The effect of the final amendments was in general to "increas[e] the amount which producers received for milk produced throughout the Southern Michigan milk marketing area." Pet. App. 9a.[6]

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and demand for milk and its products in the marketing area to which the contemplated agreement, order, or amendment relates, he shall fix such prices as he finds will reflect such factors, insure a sufficient quantity of pure and wholesome milk to meet current needs and further to assure a level of farm income adequate to maintain productive capacity sufficient to meet anticipated future needs, and be in the public interest. Thereafter, as the Secretary finds necessary on account of changed circumstances, he shall, after due notice and opportunity for hearing, make adjustments in such prices.

[6] Prior to the amendments, Order 40 divided the Michigan lower peninsula into seven zones, in each of which a different location adjustment applied. The amount of the location adjustments ranged from 0 cents to -17 cents per hundredweight of milk, increasing (in absolute terms) with the distance of the zone from the market consisting of Detroit, Flint, and Bay City. As amended, Order 40 divides the lower

In written exceptions to the recommended decision, Kraft, Inc., argued that the Secretary had failed to comply with Section 608c(18). Pet. App. 99a. In Kraft's view, Section 608c(18) did not permit the Secretary to change the location adjustments because he had not found such changes necessary to ensure an adequate supply of fluid milk. *Ibid.* The Secretary rejected that argument, explaining that Section 608c(18) does not apply when he prescribes or changes the terms providing for location adjustments. Pet. App. 99a-100a. Rather, the Secretary stated that Section 608c(18) applies only when he prescribes or changes the terms in a milk marketing order that fix minimum prices. *Ibid.*

c. Petitioners sought administrative review by an administrative law judge (ALJ), who concluded that the Secretary's decision was contrary to law. Pet. App. 208a-265a. The ALJ held, *inter alia*, that the Secretary's view that he was not required to comply with Section 608c(18) when he prescribes or amends location adjustments was a "change of policy." *Id.* at 252a. The ALJ based that determination primarily upon the Secretary's decision in *In re Borden, Inc.*, 46 Agric. Dec. 1315, 1402 (1987). See Pet. App. 243a, 256a-257a.

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peninsula into three zones, with location adjustments of 0 cents, -5 cents, and -7 cents (based on the distance of the zone from the same three-city market). In addition, for plants outside of the lower peninsula, location adjustments are determined by applying a mileage rate to the distance between the plant and a plant inside the peninsula specified by the Secretary. The amendments at issue here increased the mileage rate from 1 cent to 2.25 cents per hundredweight per 10 miles. See Pet. App. 9a-10a.

d. The Judicial Officer of the Department of Agriculture reversed the ALJ's decision. Pet. App. 61a-207a. He explained that "location adjustments are not the 'minimum prices to be paid to producers,' referred to in § [608c](18), but, rather, are *adjustments* (under § [608c](5)) to such minimum prices." *Id.* at 181a. He also stated that the Secretary had interpreted Section 608c(18) not to apply to the issuance or amendment of location adjustments "[f]or over 50 years." *Id.* at 180a. He rejected the ALJ's view that the Secretary had applied a different interpretation in *Borden*. *Id.* at 186a. The Judicial Officer's decision constituted the final decision of the Secretary. See 7 C.F.R. 2.35(a).

2. The present action consolidates judicial challenges to the Secretary's final decision by milk producers and milk handlers, the latter being petitioners in this Court. See Pet. App. 10a-12a, 43a-44a. On cross-motions for summary judgment, the district court set aside the Secretary's decision. *Id.* at 41a-60a.

The district court held that the Secretary is required to conduct the economic analysis prescribed in Section 608c(18) before issuing or amending location adjustments. Pet. App. 50a-58a. The court believed that that holding followed from the meaning of the term "minimum price" in Sections 608c(5) and 608c(18). See *id.* at 52a-54a. The court regarded that term as "not ambiguous." *Id.* at 53a. In its view, "the term minimum price encompasses both the original uniform price and the adjusted price." *Id.* at 54a. Based on that view, it reasoned that, "[s]ince the term minimum price includes adjusted prices, any regulation changing the adjustments in price must necessarily affect the minimum price." *Ibid.*

Because the district court concluded that the Secretary's interpretation conflicts with unambiguous statutory language, it did not decide whether the Secretary's interpretation had changed. The court stated, however, that "[a]t times, the Secretary seem[ed] to have adopted" a different interpretation. Pet. App. 55a. The court based that statement on a Department of Agriculture pamphlet and the Secretary's decision in *Borden*. *Id.* at 55a-56a.

3. The court of appeals reversed, Pet. App. 1a-40a, upholding the Secretary's interpretation of the Act under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Applying the first step of the *Chevron* analysis, the court identified "the precise issue" of statutory interpretation at issue here as "whether the Secretary is required to undertake a § 608c(18) economic analysis when exercising his [608c(5)] authority to make location adjustments to the minimum price of milk." Pet. App. 21a. The court determined that Congress had not "directly spoken" to that issue in the text of the Act, *id.* at 22a-23a, and that the legislative history of the Act "d[id] not make Congress' intent * * * any clearer," *id.* at 27a. Then, under the second step of the *Chevron* analysis, the court concluded that the Secretary's interpretation of the Act is reasonable and consistent with congressional intent, and therefore entitled to *Chevron* deference. *Id.* at 32a.

The court found evidence that the Secretary had previously considered some of the factors specified in Section 608c(18) when making location adjustments under Section 608c(5). Pet. App. 30a. The court concluded, however, that any inconsistency in the Secretary's interpretation "does not allow [the] [c]ourt simply to discount his current position." *Ibid.*

Instead, the court held that the Secretary's position is still entitled to some deference. *Id.* at 30a-31a.[7]

ARGUMENT

The court of appeals correctly sustained the Secretary of Agriculture's interpretation of the Agricultural Marketing Agreement Act of 1937. The court's decision does not conflict with any decision of this Court or another court of appeals. Indeed, as the court of appeals observed, the question of statutory interpretation involved here is one of first impression. Pet. App. 15a. Further review is therefore not warranted.

1. Petitioners first contend (Pet. 10-14) that the Secretary's interpretation of the Act is not entitled to *Chevron* deference because it reflects a change in interpretation that the Secretary failed to acknowledge and explain. That contention is incorrect. First, the Secretary has not changed his interpretation of the Act. Second, even if he had, his current interpretation is entitled to *Chevron* deference.

a. The Secretary has consistently interpreted the Act not to require him to undertake the economic analysis prescribed in Section 608c(18) for the fixing of minimum prices when he formulates location adjustments under Section 608c(5). In *In re Borden*, 46 Agric. Dec. 1315 (1987), for example, the Secretary

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[7] The court of appeals also rejected petitioners' arguments that the changes in location adjustments were invalid because they were not based on substantial record evidence; they were not based on an "economic service of benefit" to handlers; and they were based on the "prohibited factor" of the handlers' use of the milk. Pet. App. 32a-33a; see also *id.* at 34a-40a. Petitioners do not renew those arguments in this Court. See Pet. 14 n.12.

repeatedly emphasized that his authority to make location adjustments derives exclusively from Section 608c(5).[8]

Although the district court expressed doubt about the consistency of the Secretary's interpretation, it did not squarely hold that his interpretation had changed. The district court merely stated that, "[a]t times, the Secretary *seems* to have adopted" an interpretation that differed from the one he applied in the present case. Pet. App. 55a (emphasis added). The court of appeals found "evidence * * * indicating that the Secretary has given at least lip service to § 608c(18) when making § 608c(5) location adjustments in the past." *Id.* at 30a. Ultimately, however, the court of appeals held that the interpretation was entitled to *Chevron* deference even if it had changed. *Id.* at 31a-32a.

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[8] See, *e.g.*, *Borden*, 46 Agric. Dec. at 1395 ("Since the location adjustment at issue here * * * is expressly authorized by the location adjustment provisions of the Act, * * * there is, of course, no need to find any *other* statutory authorization. * * * [I]t is not necessary to find that the location adjustment satisfies any of the *other* broad objectives of the Act, such as the objective of establishing orderly marketing conditions, or ensuring an adequate supply of milk. It is enough to show that the location adjustment accomplishes the broad congressional objective of pricing milk according to its location value."); *id.* at 1457 ("[U]nless the Secretary has express statutory authority in § 8c(5) of the Act to increase the location adjustment at issue here, he does not acquire that authority under the statement of policy in § 2(4) of the Act. Conversely, if the Secretary has statutory authority to increase the location adjustment under the adjustment provisions of 7 U.S.C. § 608c(5)(A) * * *, that authority would not be decreased in any manner if inequities among producers and handlers did not constitute disorderly marketing conditions").

Moreover, petitioners failed to show that the Secretary's interpretation had changed. Petitioners cited a statement in a Department of Agriculture pamphlet entitled *Questions and Answers on Federal Milk Marketing Orders* defining "minimum price" as "the least amount that proprietary handlers can pay producers for milk." Pet. App. 28a, 55a (quoting pamphlet). Petitioners argued, and the courts below agreed, that "[t]his definition necessarily assumes that location adjustments are part of the minimum price." *Ibid.* That argument, however, assigns to the statement significance that it will not bear. The pamphlet was intended merely to provide a general description of milk marketing regulation to the lay public. It was not meant as a definitive explication of subtle issues of statutory interpretation such as the one involved in this case.

Nor does the Secretary's prior decision in *Borden* evidence a change in his interpretation. Petitioners cited statements in *Borden* indicating that, in prescribing location adjustments under Section 608c(5), the Secretary may consider the adequacy of the milk supply in a marketing area, which is one of the economic factors that the Secretary is required to consider in Section 608c(18). See Pet. App. 28a. Even the court of appeals believed that those statements did no more than "*impl*[*y*] that the Secretary's location adjustments must comply with the requirements of § 608c(18)." *Id.* at 29a (emphasis added). Moreover, as the Secretary explained in his decision in this case, *id.* at 186a-187a, any such implication is dispelled when *Borden* is read in its entirety. The Secretary made clear in *Borden* that, while he believes that he has the discretion to consider the adequacy of the milk supply in prescribing location adjustments, he

does not believe that he is required to consider that factor.[9] He also took the position that he has discretion to consider other economic factors that might well be encompassed in Section 608c(18), to the extent that those factors bear upon location adjustments.[10] The Secretary took precisely the same position in the present case:

> Depending on the facts relevant to a particular location adjustment, some of the same factors that are required to be considered in Class price changes under § [608c](18) may be considered in a location adjustment change under § [608c](5), but there is no statutory requirement that a location

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[9] See *Borden*, 46 Agric. Dec. at 1395 ("it is not necessary to find that the location adjustment * * * ensur[es] an adequate supply of milk"); *id.* at 1420 (Secretary's consideration of adequacy of milk supply and other factors, such as disorderly marketing conditions, "are merely different aspects of the single common theme * * * that the producers providing the economic service of transporting milk to [a particular location] should be compensated for providing that economic service of benefit to the handlers [in that location]").

[10] See note 9, *supra*; see also *Borden*, 46 Agric. Dec. at 1428 (Secretary's consideration of inequity among producers in making location adjustments does not have to be authorized by statutory provision requiring uniformity; instead, review is to determine "whether the Secretary acted in an arbitrary and capricious manner when he looked at producer inequities in deciding whether to exercise his express statutory authority to adjust the uniform Class I prices of milk paid by handlers based on 'the locations at which delivery of such milk * * * is made to such handlers'," quoting 7 U.S.C. 608c(5)(A)); *id.* at 1451 ("we are only reviewing the Secretary's findings as to equity among handlers to determine whether the Secretary used his express location-adjustment authority in an arbitrary and capricious manner").

> adjustment change under § [608c](5) be supported by a § [608c](18) analysis.

Pet. App. 185a-186a. Thus, the Secretary's interpretation of the Act has not changed.

b. In any event, assuming arguendo that the Secretary's interpretation of the Act has changed, the court of appeals properly deferred to his interpretation under *Chevron*.

i. Petitioners contend (Pet. 12-13) that, when an agency changes its interpretation of a statute, its new interpretation is not entitled to *Chevron* deference unless the agency acknowledges and explains the reason for the change. That contention fails to distinguish between two distinct principles of administrative law.[11]

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[11] Although petitioners devote their submission in this Court to the Secretary's failure to explain an asserted change in his interpretation of Section 608c(18), that was only one of the many issues that were fully aired and that the Secretary addressed in the agency proceeding. The Secretary (through the AMS) conducted a formal, on-the-record rulemaking proceeding, the adequacy of which petitioners do not challenge. See Pet. App. 10a. He explained the basis for his action in a proposed decision to which petitioners were entitled to file exceptions. See *id.* at 99a. The final decision was subject to a producer referendum, followed by administrative review by an ALJ and the Judicial Officer. At each stage, the decisionmaker issued a lengthy opinion specifically addressing, among other things, the contention that the Secretary was required to conduct the analysis prescribed in Section 608c(18) and had done so in prior proceedings involving location adjustments. See *id.* at 99a-100a (AMS's decision); *id.* at 180a-181a (Judicial Officer's decision); *id.* at 252a (ALJ's decision). The elaborate nature of the agency proceeding and the specific attention to the issue that petitioners raise in this Court belie

The *Chevron* principle requires courts to defer to an agency's reasonable interpretation of an ambiguous provision in a statute that it is charged with administering. See 467 U.S. at 843; accord, *e.g.*, *Good Samaritan Hosp.* v. *Shalala*, 113 S. Ct. 2151, 2159 (1993). This Court has never held that *Chevron* deference is unwarranted when an agency's interpretation, though reasonable, reflects a change that the agency has failed to acknowledge and explain. On the contrary, in *Chevron* as well as other cases, the Court has deferred to agency interpretations that had changed without imposing a requirement that the agency acknowledge or explain the change. See *Chevron*, 467 U.S. at 863 (upholding agency interpretation despite "[t]he fact that the agency ha[d] from time to time changed its interpretation"); see also *NationsBank of North Carolina, N.A.* v. *Variable Annuity Life Ins. Co.*, 115 S. Ct. 810, 817 (1995); *Good Samaritan*, 113 S. Ct. at 2160-2162; *NLRB* v. *Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 780-781, 787 (1990); *id.* at 799 (Blackmun, J., dissenting); *NLRB* v. *Local Union No. 103, Int'l Ass'n of Bridge Workers*, 434 U.S. 335, 350-351 (1978). As the Court in *Chevron* explained, 467 U.S. at 863-864:

> An initial agency interpretation is not instantly carved in stone. On the contrary, the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis.

Thus, the fact that an agency has changed its interpretation of a statute "might reduce, but [does]

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petitioners' suggestion (Pet. 10-13 & n.11) that the Secretary failed to exercise his discretion in a considered manner.

not eliminate, the deference [a court] owe[s] [to the agency's] reasoned determination." *NationsBank*, 115 S. Ct. at 817.[12]

Another principle of administrative law requires an agency to explain its action on matters of policy sufficiently to permit judicial review of that action under the "arbitrary and capricious" standard of the Administrative Procedure Act, 5 U.S.C. 706(2)(A). See, *e.g.*, *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 48-49 (1983); *Bowman Transp., Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285-286 (1974); see also *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947). The nature of the required explanation varies from case to case, depending on the nature and background of the agency action before the court. In *Motor Vehicle*, for example, the Court held that the Secretary of Transportation did not adequately explain his rescission of a safety standard that had required motor vehicles to have either airbags or passive seat belts. See 463 U.S. at 34-38. The Court determined that the Secretary was required to explain why he did not

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[12] Of course, if an agency has changed its interpretation of an ambiguous statutory provision, its explanation for the change may well assist the court in assessing the reasonableness of the new interpretation under step two of the *Chevron* analysis. Thus, in according *Chevron* deference to an agency statutory interpretation that had changed, the Court in *Rust* v. *Sullivan*, 500 U.S. 173, 187 (1991), noted that the agency had provided an explanation for the change. As petitioners appear to acknowledge (Pet. 12), however, *Rust* does not stand for the broad proposition that an agency's reasonable interpretation of an ambiguous statutory provision is never entitled to *Chevron* deference unless the agency acknowledges and explains any change in its interpretation.

modify the standard to require either airbags alone or airbags and continuous ("spooling") passive seat belts, because, in the Court's view, those were obvious alternatives to rescission in light of prior statements by the Secretary. See *id.* at 46-57; see also *id.* at 51 ("given the judgment made in 1977 that airbags are an effective and cost-beneficial life-saving technology, the mandatory passive restraint rule may not be abandoned without any consideration whatsoever of an airbags-only requirement"), 56 (in light of prior statement that continuous passive seat belts were safe, agency was required to explain why they were not acceptable on safety grounds).

Petitioners contend (Pet. 12) that the principle enunciated in *Motor Vehicle* "should be held to apply in the *Chevron* setting." This case, however, differs sharply from *Motor Vehicle*. Petitioners have shown, at most, only that the Secretary previously interpreted the Act in a different manner. Petitioners have pointed to no statement of the Secretary's rationales for the interpretation that, they assert, he previously adopted. Accordingly, unlike the agency in *Motor Vehicle*, the Secretary cannot be expected to explain why he no longer subscribes to rationales to which he never subscribed in the first place. Instead, assuming arguendo that the *Motor Vehicle* principle applies in determining whether the Secretary's interpretation is entitled to *Chevron* deference, the principle was satisfied by the Secretary's reasonable explanation for his current interpretation. In any event, petitioners' premise that the Secretary has changed his legal interpretation rests primarily on the prior decision in *Borden*; yet the Secretary's final decision in this case extensively discusses *Borden* and rejects the proposition that his decision here

departs from *Borden*. Pet. App. 186a-191a. Petitioners' contention that the Secretary ignored prior agency pronouncements in the area therefore is without merit.

The court of appeals' decision sustaining the Secretary's interpretation in these circumstances does not conflict with the lower court decisions cited by petitioners (see Pet. 10-11). Petitioners cite no decision in which a court has set aside an agency interpretation that the court considered reasonable on the ground that the agency refused to acknowledge and explain a prior, conflicting interpretation.[13] The only decision cited by petitioners reversing an agency's interpretation held that the agency's interpretation was substantively irrational. *Mazza* v. *Secretary of HHS*, 903 F.2d 953, 960 (3d Cir. 1990).[14] In several other decisions cited by petitioners agency interpretations that had changed were upheld because the agency provided a reasonable explanation for its *current* interpretation. In *Sacred Heart Medical*

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[13] Petitioners acknowledge (Pet. 11 n.9) that the decision below is consistent with *De Osorio* v. *INS*, 10 F.3d 1034 (1993), in which the Fourth Circuit held that, because the agency interpretation before the court was reasonable, it was "immaterial" whether the agency had previously subscribed to a different interpretation. *Id.* at 1042.

[14] Respondents Farmers Union Milk Marketing Cooperative, *et al.*, err in arguing (Resp. Br. in Support of Pet. 14) that the decision below conflicts with *Lehigh Valley Farmers* v. *Block*, 829 F.2d 409 (3d Cir. 1987). *Lehigh Valley* held that the Secretary's decision to expand the geographic area covered by two milk marketing orders was not supported by substantial record evidence. *Id.* at 412-416. That holding is inapposite here.

Ctr. v. *Sullivan*, 958 F.2d 537, 545 (3d Cir. 1992), for example, the court stated:

> Here, the Secretary contends that, although the HCFA may have previously interpreted the statute improperly, its current construction is in full accord with the language of the [statute] and the legislative intent that motivated its enactment. This surely constitutes a "reasoned justification" for the Secretary's departure from its prior interpretation. Accordingly, the Secretary's interpretation of the statute must be upheld if this Court determines that it is reasonable.

See *id.* at 550 ("although the [agency] espoused a different interpretation * * * previously, it has offered a reasonable justification for its new position").[15]

ii. Under the case law cited by petitioners, the Secretary provided a "reasoned justification" for his interpretation by showing that it "is in full accord with the language of the [statute] and the legislative intent that motivated its enactment." *Sacred Heart*, 958 F.2d at 545. The AMS's and the Judicial Officer's

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[15] See also *Mobil Oil Corp.* v. *EPA*, 871 F.2d 149, 151-154 (D.C. Cir. 1989) (framing issue as whether agency had "arrived at" a reasonable interpretation, and upholding "new" interpretation based on its reasonableness); *Seldovia Native Ass'n* v. *Lujan*, 904 F.2d 1335, 1346 (9th Cir. 1990) (Secretary adequately explained change in interpretation by showing that new interpretation was consistent with regulations and administrative practice under comparable statute, and facilitated administrative determinations required of State); *Exxon Corp.* v. *Lujan*, 970 F.2d 757, 762 n.4 (10th Cir. 1992) (agency adequately explained asserted change in interpretation by showing that current interpretation was consistent with legislative history).

decisions make clear that the Secretary believes that the Act cannot properly be read to require him to undertake an analysis under Section 608c(18) when he issues or amends location adjustments under Section 608c(5). See Pet. App. 99a-100a, 180a-181a.[16]

The statutory text supports the Secretary's view. Section 608c(5) authorizes the Secretary to include in milk marketing orders terms that: (1) "[c]lassify[] milk" according to its end use; (2) "fix[], or provid[e] a method for fixing, minimum prices for each such use classification"; and (3) provide for "adjustments" to "[s]uch prices," based on 'the locations at which delivery of such milk * * * is made to such handlers." Section 608c(18), in turn, applies only to terms that "fix minimum prices." Section 608c(18) thus does not apply when the Secretary prescribes or amends terms classifying milk according to its use or providing for location adjustments.

That conclusion is reinforced by the different nature of minimum prices and location adjustments. Section 608c(18) requires the Secretary, in fixing minimum prices, to consider "the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk and its products in the marketing area." 7 U.S.C. 608c(18). The relevance of those factors to the price of milk is obvious. Those factors are not,

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[16] Thus, the Secretary, unlike the court of appeals (Pet. App. 22a), does not believe that petitioners' interpretation of the Act is reasonable. See Pet. App. 22a. For the reasons discussed in the prior section, however, the court's disagreement with the Secretary regarding the reasonableness of *petitioners'* interpretation provided no basis for striking down the *Secretary's* interpretation.

however, invariably relevant to determining how the price of milk should be adjusted to reflect "the locations at which delivery of * * * milk * * * is made." 7 U.S.C. 608c(5)(A)(3). Thus, Congress intended to allow the Secretary to conduct a more focused inquiry when formulating location adjustments under Section 608c(5) than he is required to undertake when fixing minimum prices under Section 608c(18).

Unlike the Secretary's interpretation, petitioners' interpretation ignores critical statutory language. Petitioners have argued that Section 608c(18) applies to location adjustments because those adjustments affect the price of milk. See Pet. App. 18a, 52a. The district court agreed, reasoning that "any regulation changing the adjustments in price must necessarily affect the minimum price." *Id.* at 54a. That reasoning ignores that Section 608c(18) does not apply to every term in a marketing order that *affects* the minimum price; instead, it applies only to terms that "*fix* the minimum price." 7 U.S.C. 608c(18) (emphasis added). A term can be said to "fix" the minimum price only if it specifies a minimum price or prescribes a method for calculating minimum prices. See 7 U.S.C. 608c(5)(A) (1988 & Supp. V 1993) (Secretary shall prescribe terms "fixing, or providing a method for fixing, minimum prices"). Because the terms providing for location adjustments do neither, they are not covered by Section 608c(18). Compare 7 C.F.R. 1040.50-1040.51a (price terms) with 7 C.F.R. 1040.52 (terms providing for location adjustments).

In accepting petitioners' contrary interpretation, the district court attached significance to legislative history indicating that Section 608c(18) was enacted "for the guidance of the Secretary in fixing milk

prices." Pet. App. 57a (quoting S. Rep. No. 565, 75th Cong., 1st Sess. 3 (1937)). The court reasoned that "[i]t would be illogical for Congress to carefully articulate all factors the Secretary must take into account when fixing class prices yet allow location adjustments, which ultimately affect the actual cost of milk, to be adjusted without any guidance whatsoever." *Id.* at 57a-58a. The Secretary is not without guidance, however; he must base the adjustments on "the locations at which delivery of such milk * * * is made to [milk] handlers." 7 U.S.C. 608c(5)(A)(3). Thus, he cannot use location adjustments as a way of circumventing the price-fixing analysis of Section 608c(18). As the court of appeals correctly determined (Pet. App. 23a-24a), the district court misread the legislative history.

2. Petitioners also contend (Pet. 15-18) that, in determining whether Congress has "directly spoken to the precise question at issue," as required under the first step of the *Chevron* analysis, 467 U.S. at 842, the court of appeals failed to draw reasonable inferences from the statutory text that, petitioners claim, support their interpretation. Pet. 15. As discussed above, however, the text of the Act supports the Secretary's, not petitioners', interpretation. In any event, the question whether the court of appeals articulated its analysis of the Act in sufficient detail in this particular case does not warrant review by the Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In The

Supreme Court of the United States

OCTOBER TERM, 1995

LANSING DAIRY, INC., *et al.*,

Petitioners,

v.

DAN GLICKMAN, *et al.*,
SECRETARY OF AGRICULTURE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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REPLY BRIEF FOR THE PETITIONERS

The court of appeals rejected as "not credible" the government's contention that the agency did not depart from its longstanding interpretation of an important statutory provision. Pet. App. 30a. The court of appeals nevertheless accorded full deference to the agency's current interpretation under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), on the ground that the agency's failure to acknowledge or explain its departure is "irrelevant" as long as the new interpretation is otherwise "reasonable." Pet. App. 31a. Further review is warranted because the court of appeals has decided an important question under the *Chevron* doctrine in a way that conflicts with decisions of this Court and other courts of appeals.[1]

1. a. The government contends (U.S. Br. in Opp. 9-13) that the agency has not changed its interpretation of the statute. That fact-bound contention was rejected by both courts below, as well as by the agency's own ALJ. See Pet. App. 30a, 55a-57a, 252a. This Court generally does not revisit factual determinations where both courts below are in accord. See *Goodman* v. *Lukens Steel Co.*, 482 U.S. 656, 665 (1987); *Graver Tank & Mfg. Co.* v. *Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949).

The government attempts to avoid this rule by asserting that the district court "did not squarely hold that [the agency's] interpretation had changed." U.S. Br. in Opp. 10. That assertion reflects either wishful thinking or a highly

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[1] Respondents do not dispute the importance of the question presented. Nor do they dispute the practical significance of the underlying statutory question in this case, which concerns the agency's discretion to set minimum prices for more than 100 billion pounds of raw milk each year. See Pet. 9.

selective reading of the district court's opinion. The district court noted that the definition of "minimum price" in an agency publication "necessarily assumes that location adjustments are part of the minimum price," and that "[t]he Secretary, through his Judicial Officer, has even more overtly acknowledged that he has a duty to comply with section 608c(18) when promulgating location adjustments." Pet. App. 55a. The district court also found that the agency had presented "absolutely no evidence" to support its position, and that the Judicial Officer's prior decision in *In re Borden*, 46 Agric. Dec. 1315 (1987), aff'd, No. H-88-1863 (S.D. Tex. 1990), "clearly indicates that location adjustments are governed by the provisions of section 608c(18)." Pet. App. 56a. The court of appeals had no difficulty recognizing that "[t]he district court determined that the Secretary's prior interpretations of §§ 608c(5) and 608c(18) explicitly recognized the fact that the Secretary's ability to promulgate location adjustments was restricted by § 608c(18)." Pet. App. 28a. See also *id.* at 27a (district court "found . . . that the Secretary's 'new' interpretation . . . reverses a longstanding agency policy.") The government's effort to read the district court's opinion as saying something other than what it clearly says is indefensible.

In any event, the agency's contention that it has not changed its interpretation is no more credible in this Court than it was in the courts below. According to the government, "[p]etitioners cited statements in *Borden* indicating that, in prescribing location adjustments under Section 608c(5), the Secretary *may* consider the adequacy of the milk supply in a marketing area, which is one of the economic factors that the Secretary is required to consider in Section 608c(18)." U.S. Br. in Opp. 11 (emphasis added). In fact, *Borden* states that § 608c(18) "*requires* the Secretary to set milk prices, *including location adjustments*, at a level that will, by themselves, 'insure' a sufficient quantity of

milk." 46 Agric. Dec. at 1459-60 (emphasis added); see also *id.* at 1461 ("Secretary is *required* by [§ 608c(18)] to make certain that the Class prices *and location adjustments* in every milk order are high enough to attract milk to every part of a marketing area") (emphasis added).[2]

b. i. The government next argues (U.S. Br. in Opp. 13-18) that an agency's current interpretation of a statute that it administers is entitled to *Chevron* deference even if the agency has abandoned a prior longstanding interpretation without acknowledging or explaining the reasons for its action. The government thus agrees with the court of appeals that cases such as *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983), have no application in the *Chevron* setting. But the government's endorsement of the court of appeals' decision cannot alter the fact that four other courts of appeals have held that the *State Farm* principle applies at stage two of the *Chevron* analysis. See Pet. 10-11 (citing cases from D.C., Third, Ninth, and Tenth Circuits). Indeed, this Court applied that principle in *Rust* v. *Sullivan*, 500 U.S. 173, 187 (1991). And in *Chevron* itself, the Court held that agency interpretations of ambiguous statutory language are "given controlling weight *unless they are arbitrary, capricious*, or manifestly contrary to the statute." 467 U.S. at 844 (emphasis added). See *State Farm*, 463 U.S.

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[2] See also Pet. App. 28a (agency publication "necessarily assumes that location adjustments are part of the minimum price"); *id.* at 30a (agency brief in a prior case acknowledged that locations adjustments are "governed by" § 608c(18)); 30 Fed. Reg. 7903, 7905 (1965) (agency rulemaking decision acknowledged that location adjustments are part of the "minimum price structure").

at 41-42 (agency's failure to supply a reasoned analysis for change is arbitrary and capricious).[3]

The government urges the Court to ignore the court of appeals decisions cited in the petition because the government ended up winning all but one of the cases, and lost the remaining case on multiple grounds. See U.S. Br. in Opp. 17. But the relevant question, for purposes of determining whether a circuit conflict exists, is whether a question of federal law has been decided differently by different circuits. See S. Ct. R. 10.1. The government does not dispute that whether the *State Farm* principle applies in the *Chevron* context is a federal question, or that four other courts of appeals have decided that question differently from the court of appeals in this case.

On the merits, respondents fail to address petitioners' basic argument that the *State Farm* principle dovetails with the basis for *Chevron* deference, *i.e.*, recognition that interpretation of ambiguous statutory language is "often more a question of policy than of law," *Pauley* v. *Bethenergy Mines, Inc.*, 501 U.S. 680, 696 (1991). See Pet. 12-13. The government argues (U.S. Br. in Opp. 16) that "[p]etitioners have pointed to no statement of the Secretary's rationales for

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[3] Respondents rely (U.S. Br. in Opp. 14; PEC Br. in Opp. 7-8) on this Court's recent statement in *Nationsbank of North Carolina, N.A.* v. *Variable Annuity Life Ins. Co.*, 115 S. Ct. 810, 817 (1995), that "any change in the Comptroller's position might reduce, but would not eliminate, the deference we owe his reasoned determinations." That statement plainly does not excuse the agency from acknowledging and explaining a change of interpretation. Indeed, the requirement of "*reasoned* determinations" suggests the contrary. The other decisions of this Court cited at p. 14 of the government's brief (including a dissenting opinion and a decision that pre-dates *Chevron* by several years) simply do not address the question presented in this case.

the interpretation that . . . he previously adopted," and that "the Secretary cannot be expected to explain why he no longer subscribes to rationales to which he never subscribed in the first place." But the need to acknowledge and explain — *i.e.*, deliberately abandon — a prior agency interpretation arises without regard to whether the rationale for the prior interpretation was stated (although agencies often provide such explanations). And in any event, the agency is not required to invent, and then reject, rationales "to which it never subscribed"; the agency is simply required to provide a reasoned explanation for the change, *i.e.*, to explain why the new interpretation is more reasonable than the prior interpretation, in terms of principles of statutory construction, policy goals, or regulatory context. *Chevron*, 467 U.S. at 845, 858-59.

The government fails to acknowledge the startling implications of its position. Under the government's view, agencies are entitled to switch from one "reasonable" interpretation of a statute to another without acknowledging or explaining what they are doing — and, indeed, are entitled to switch repeatedly among two or more "reasonable" interpretations to achieve the result they are seeking in a particular case. If courts are powerless to withhold *Chevron* deference in the face of such arbitrary and capricious action, the *Chevron* doctrine will be transformed from a rule of judicial deference to agency policymaking into a rule of judicial abdication to lawless agency behavior.[4]

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[4] In a footnote, the government makes the ambiguous concession that "if an agency has changed its interpretation of an ambiguous statutory provision, its explanation for the change may well assist the court in assessing the reasonableness of the new interpretation under step two of the *Chevron* analysis." U.S. Br. in Opp. 15 n.12. At a minimum, this suggests that the court of appeals erred in dismissing the agency's unexplained departure from its prior interpretation as "irrelevant." Pet.

ii. The government's final contention (U.S. Br. in Opp. 18-21) is that the agency provided the requisite explanation for its change of position in this case. That contention is plainly incorrect. First, the agency did not acknowledge that it was changing position. Other courts of appeals require an agency both to acknowledge *and* explain a change of interpretation as a prerequisite for *Chevron* deference. *Seldovia Native Ass'n, Inc.* v. *Lujan*, 904 F.2d 1335, 1346 (9th Cir. 1990) (no deference unless "agency acknowledges *and* explains the departure from its prior views") (internal citation omitted); *Mobil Oil Corp.* v. *EPA*, 871 F.2d 149, 154 (D.C. Cir. 1989) (agency "acknowledged . . . change" *and* "cogently explained reasons for it") (emphasis added). The requirement of an acknowledgement ensures "that prior policies and standards are being deliberately changed, not casually ignored." 871 F.2d at 152 n.5 (quoting *Greater Boston Television* v. *FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971)).[5]

In addition, the government's argument confuses an agency's statement of its current statutory interpretation with its explanation of the decision to abandon a prior interpretation. "The agency will be required to show not only that its new policy is reasonable, but also to provide a

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App. 31a. To the extent the government concedes that an inadequate explanation of a change may render an otherwise reasonable interpretation unreasonable for *Chevron* purposes, it concedes the entire issue.

[5] Outside the *Chevron* context, acknowledgement of the change is an established element of the *State Farm* requirement. See, *e.g.*, *Busboom Grain Co.* v. *ICC*, 856 F.2d 790, 796 (7th Cir. 1988) (agency "must acknowledge and give reasons for the change"); see also *Telecommunications Research & Action Ctr.* v. *FCC*, 26 F.3d 185, 193 (D.C. Cir. 1994); *Panhandle Producers & Royalty Owners Ass'n* v. *Economic Regulatory Admin.*, 847 F.2d 1168, 1176 (5th Cir. 1988).

reasonable rationale supporting its departure from prior practice." *Seldovia*, 904 F.2d at 1345; see also *Exxon Corp.* v. *Lujan*, 970 F.2d 757, 762 n.4 (10th Cir. 1992); *Borden*, 46 Agric. Dec. at 1378 ("heavier burden" imposed when agency is "'changing its course'") (quoting *State Farm*, 463 U.S. at 42). The old interpretation may (or may not) be more reasonable than the new one, judged by principles of statutory construction or the agency's policy goals. See *Chevron*, 467 U.S. at 843 n.11 (court "need not conclude that the agency construction [is] . . . the reading that court would have reached if the question initially had arisen in a judicial proceeding"). In addition, parties may have relied on the old interpretation in ways that counsel against a switch. Consequently, the explanation offered in support of a change must include some type of comparative analysis. In this case, the agency steadfastly denied that it was departing from its prior interpretation, and thus had no occasion to engage in a comparative analysis.[6]

iii. Respondent PEC contends (PEC Br. in Opp. 10-18) that the court of appeals should have decided this case in the government's favor at stage one of the *Chevron* analysis. The government does not make this argument, the court of appeals rejected it, see Pet. App. 23a, and the district court decided the case *in petitioners' favor* at stage one of the *Chevron* analysis, see Pet. App. 53a-55a. PEC's argument is misguided. Although there are strong arguments that this is a "plain language" case, those arguments support petitioners, not respondents.

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[6] Because this proceeding was a formal "on the record" rulemaking, any such explanation had to be made in the rulemaking decision. See Pet. App. 172a.

The underlying statutory question in this case is whether terms in a milk marketing order that fix or modify adjustments to minimum milk prices are among the terms that "fix minimum prices to be paid to producers" or "modify[] such prices." 7 U.S.C. § 608c(18). The statutory text provides at least three reasons for answering that question in the affirmative. *First*, the ordinary meaning of "price[]" is "the sum of money or goods asked or given for something" or "the cost at which something is obtained." *Webster's II New Riverside University Dictionary* 933 (1988). It is undisputed that the minimum amount of money actually paid to dairy farmers for raw milk is the sum of a uniform price and the adjustments to that price. *Second*, the statutory text reinforces the ordinary meaning of "price" by providing that § 608c(18) applies to all terms that "fix minimum prices *to be paid to producers*." (Emphasis added). This further supports the conclusion that price adjustments and other terms that determine the minimum prices actually paid to producers are among the terms that fix or modify minimum prices.[7] *Third*, § 608c(5)(A) provides that minimum prices "shall be uniform . . ., *subject only to* adjustments," (emphasis added), thus implying that adjusted (non-uniform) prices are "minimum prices." See Pet. App. 54a.[8]

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[7] The government accuses petitioners of "ignor[ing] critical statutory language." U.S. Br. in Opp. 20. In fact, it is the government that ignores the statutory language providing that §608c(18) applies to all terms that "fix minimum prices *to be paid to producers*." See, *e.g.*, U.S. Br. in Opp. 19, 20. The government ascribes to petitioners (without citation to the petition) an argument that § 608c(18) applies to terms in a milk marketing order that "affect" the price of milk. See U.S. Br. in Opp. 20. Petitioners contend that price adjustments do not merely "affect" minimum prices; they are among the terms that "fix" or "modify" such prices.

[8] Apart from the language of the statute, the district court's interpretation of the statute is also consistent with Congress's intent "to confine the boundaries of the Secretary's delegated authority" under the

2. The petition also contends (Pet. 15-18) that the court of appeals declined to draw reasonable inferences from the statutory text at stage one of the *Chevron* analysis, contrary to recent decisions of this Court such as *Brown* v. *Gardner*, 115 S. Ct. 552, 556 (1994). The government's perfunctory response is that this question "does not warrant review by the Court." U.S. Br. in Opp. 21. But petitioners have not argued that this question independently merits review. In the event that the Court grants review of the first question presented, petitioners believe that it would be appropriate to grant review of the second question as well, in order to allow the Court to engage in the full *Chevron* analysis. In the event

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AMAA. *Zuber* v. *Allen*, 396 U.S. 168, 183 (1969). See Pet. 17 n.14.

The government asserts (U.S. Br. in Opp. 19-20) that the price of feeds and the available supplies of feeds are not "invariably relevant" in determining location adjustments. U.S. Br. in Opp. 20. Of course, they *may* be relevant, as the government implicitly concedes. And in any event, § 608c(18) requires that the minimum prices actually paid for milk — including price adjustments — reflect an analysis of "economic conditions which affect market supply and demand for milk." If the agency has already considered feed prices at an earlier stage of its analysis, it need not perform a redundant analysis. (In fact, for 20 years the agency has fixed Class I milk prices not by reference to feed cost and supply, but rather based on the need "to move milk from supply areas to demand centers." 59 Fed. Reg. 42422, 42425 (1994). Compare U.S. Br. in Opp. 4 n.4 (describing location adjustments in virtually identical terms)). Section 608c(18) provides, however, that the agency may not use location adjustments as a device to fix minimum prices that do not reflect an analysis of supply and demand.

Finally, PEC's argument concerning "parity prices" (PEC Br. in Opp. 14-18) is a red herring. The agency has not used the parity pricing methodology for decades. See 59 Fed. Reg. 42422, 42424 (1994) (additional analysis undertaken because "the parity price is not reasonable"); *Borden*, 46 Agric. Dec. at 1459-60 ("Secretary has found that parity prices are unreasonable for the last 50 years").

that the Court does not grant review of the first question, petitioners believe, for the reasons stated at pages 15-18 of the petition, that it would be appropriate to grant, vacate, and remand for further consideration by the court of appeals in the light of *Brown* v. *Gardner*, 115 S. Ct. 552, 556 (1994).

CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, the petition should be granted, the decision of the court of appeals vacated, and the case remanded for further consideration in the light of *Brown* v. *Gardner*, 115 S. Ct. 552 (1994).

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